TABLE OF CONTENTS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-604

DONALD C. CASS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

APPENDIX

Civil No. 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

DONALD C. CASS, *Plaintiff*

v.

THE UNITED STATES OF AMERICA, *Defendant*

Relevant Docket Entries

6-14-71 Filed Complaint.

6-21-71 Filed Summons (served).

8-13-71 Filed Answer of Defendant.

9-16-71 Filed Preliminary Pre-Trial Order; Further proceedings are stayed pending action by the United States Supreme Court in the petition for a writ of certiorari in U. S. v. Schmidt, No. 71-631.

12-29-71 Filed Agreed Statement of Facts.

1-21-72 Filed Stipulation.

2-18-72 Filed Brief in Support of Judgment for Plaintiff; Certif. of mailing attached.

3-13-72 Filed Brief in support of judgment for defendant, with Cert. of mailing attached.

3-29-72 Filed Reply Brief in support of Judgment for plaintiff.

6- 3-72 Filed Order directing parties to submit memoranda on question of jurisdiction on or before June 15, 1972.

6-13-72 Filed Defendant's Memorandum on question of jurisdiction.

6-15-72 Filed Memorandum of Plaintiff on question of jurisdiction.

6-21-72 Filed Opinion and Order that plaintiff have judgment against the defendant in the sum of Ten Thousand Dollars ($10,000.00).

6-21-72 Filed and entered judgment that plaintiff have judgment against the defendant in the sum of Ten Thousand Dollars.

8-18-72 Filed Notice of Appeal.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

(Title omitted in printing)

Complaint

(Filed June 14, 1971)

Plaintiff alleges:

1. This action is to recover the readjustment payment to which plaintiff is entitled by virtue of his involuntary release from military service, as hereinafter more fully appears. Plaintiff is a citizen of the United States; plaintiff's claim does not exceed $10,000, and is founded on the Act of Congress of September 7, 1962, P.L. 87-651, Title I, Section 102(a), 76 Stat. 506, Amended Pub. L. 89-718, Section 6, Nov. 2, 1966, 80 Stat. 1115, USC, Title 10, Section 687.

2. On 16 July 1966, plaintiff was ordered to active duty in the U.S. Army as a First Lieutenant, as more fully appears from Exhibit "A" attached hereto and made a part hereof. Thereafter, until 26 April 1971, when he was in-

voluntarily released from active duty, plaintiff served his country continuously, faithfully and honorably as an officer on active duty in the U.S. Army including combat duty in Viet Nam and a tour on the DMZ in Korea as more fully appears on Exhibit "B" attached hereto and made a part hereof.

3. At the time of his involuntary release on 26 April 1971, plaintiff held the rank of Captain and due to his 14 years longevity received a basic monthly pay of $1,063.80.

4. By virtue of the above-cited Act of Congress plaintiff is entitled to a readjustment payment computed by multiplying his years of active service by two months basic pay or a total readjustment payment of $10,638.00. In order for this court to retain jurisdiction, plaintiff specifically and irrevocably waives all of the excess readjustment payment to which he is entitled above $10,000.00.

5. Although plaintiff has made demands and claims for said readjustment payment through the regular military channels, the defendant refused and still refuses to pay said claim or any part thereof.

WHEREFORE, plaintiff demands judgment against the United States of America in the sum of $10,000.00 and such other relief as to the court may deem just and appropriate and as the nature of the case may require.

CANNON, SMITH & GARRITY

By /s/ CHARLES A. SMITH
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

(Title Omitted in Printing)

Answer

(Filed August 13, 1971)

The defendant, United States of America, by its undersigned attorney, hereby answers the complaint in this action as follows:

1. The allegations of paragraph 1 are Conclusions of Law not requiring an answer, but to the extent deemed to be allegations of material fact, they are denied.

2. Admits that plaintiff was ordered to active duty as stated and that he was released from active duty with some 4 years, nine months and 13 days of honorable service thereafter; otherwise the allegations in paragraph 2 are denied for lack of knowledge or information sufficient to form a belief as to the truth thereof.

3. Admits that plaintiff was released from active duty holding the rank of captain with a base pay per month of $1,063.80.

4. Denies the allegations of paragraph 4.

5. Denies the allegations of paragraph 5 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

SEPARATE DENIALS

1. Denies each and every allegation of the complaint not hereinbefore expressly admitted, denied, or qualified.

2. The defendant further denies that there is anything due plaintiff because of the reasons set forth in this complaint.

WHEREFORE, the defendant United States of America prays for judgment dismissing the complaint, with prejudice; for recovery of its costs and disbursements in this action; and for such other and further relief as the Court may deem appropriate in the premises.

DATED this 12th day of August, 1971.

/s/ OTIS L. PACKWOOD
Otis L. Packwood
United States Attorney for the
District of Montana

Attorney for Defendant

(Certificate of service omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

(Title omitted in printing)

Agreed Statement of Facts

(Filed December 29, 1971)

Come now the parties above named, by and through their respective counsel, and hereby stipulate and agree that the following facts are true and hereby admit same for all purposes concerning the litigation of the above-entitled cause:

1. Plaintiff is a citizen of the United States and a resident of the State of Montana.

2. As a member of the Army Reserve, the plaintiff served a tour of active duty with the United States Army from July 16, 1966, to April 26, 1971.

3. Plaintiff had attained the rank of Captain when he was honorably and involuntarily released from active duty on April 26, 1971. At this time he was receiving the base pay of $1,063.80 per month.

4. At the time of his release from active duty on April 26, 1971, plaintiff had completed, immediately before his release, four (4) years, nine (9) months and thirteen (13) days continuous active duty.

5. On April 20, 1971, after he was notified he was to be released, plaintiff requested a lump-sum readjustment payment in accordance with the provisions of 10 U.S.C. § 687 (a), which request was refused.

6. The amount of readjustment pay due, if any, calculated in accordance with the provisions of 10 U.S.C § 687 (a) is $10,638.00; however, for jurisdictional purposes plaintiff has waived all readjustment pay due, if any, in excess of $10,000.00.

Dated this 28th day of December, 1971.

DONALD C. CASS

/s/ CHARLES A. SMITH
Charles A. Smith
Attorney for Plaintiff
DONALD C. CASS

UNITED STATES OF AMERICA

/s/ OTIS L. PACKWOOD
Otis L. Packwood
Attorney for Defendant
United States

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
HELENA DIVISION

(Title Omitted in Printing)

Stipulation

(Filed January 21, 1972)

The undersigned attorneys for the parties hereby stipulate and agree that the matter may be decided by the court based upon the Agreed Statement of Facts filed in this case.

The plaintiff shall have until February 11, 1972, to file his brief and the defendant shall have until March 10, 1972, in which to file its answering brief and the plaintiff shall have until March 20, 1972, in which to file his reply brief, at which time the matter will be deemed submitted for decision by the court.

/s/ CHARLES A. SMITH
Charles A. Smith
Cannon, Smith & Garrity
Attorneys at Law
Attorney for Plaintiff

/s/ OTIS L. PACKWOOD
Otis L. Packwood
United States Attorney for the
District of Montana
Attorney for Defendant

Order

IT IS so ordered.

/s/ RUSSELL E. SMITH
Russell E. Smith
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MONTANA

(Title Omitted in Printing)

Judgment

(Filed June 21, 1972)

This action came on for (hearing) before the Court, Honorable Russell E. Smith, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that plaintiff have judgment against the defendant in the sum of Ten Thousand Dollars ($10,000.00)

Dated at Butte, Montana, this 21st day of June, 1972.

JOHN J. PARKER
Clerk of Court

/s/ N. P. CANNON
N. P. Cannon
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

(Title Omitted in Printing)

Notice of Appeal

(Filed August 18, 1972)

NOTICE IS HEREBY GIVEN that the United States of America defendant above named hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 21st day of June, 1972.

DATED this 18th day of August, 1972.

OTIS L. PACKWOOD
United States Attorney for the
District of Montana

/s/ OTIS L. PACKWOOD
Otis L. Packwood
Attorney for Defendant

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD C. CASS, *Plaintiff-Appellee,*

v.

UNITED STATES OF AMERICA, *Defendant-Appellant.*

No. 72-2633

DC No. Civ. 2014 Res.

Judgment

APPEAL from the United States District Court for the District of Montana.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Montana and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed. With costs in this Court in favor of the Appellant and against the Appellee.

Costs:

Printing of Appellant's brief—$78.40.

Filed and entered August 1, 1973

SUPREME COURT OF THE UNITED STATES

No. 73-604

DONALD C. CASS, *Petitioner*,

v.

UNITED STATES

Order Allowing Certiorari.

Filed January 7, 1974.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The case is consolidated with No. 73-5661 and a total of one hour is allotted for oral argument.

REFERENCES TO THE OPINIONS OF THE DISTRICT COURT AND THE COURT OF APPEALS

The opinion of the United States District Court for the District of Montana dated June 20, 1972, has been published at 344 F.Supp. 550, and is printed as Appendix A of the Petition for Certiorari. The opinion of the Court of Appeals for the Ninth Circuit dated August 1, 1973, has been published at 483 F.2d 220 and is printed as Appendix B of the Petition for Certiorari.

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5661

FRANCIS A. ADAMS, ROBERT J. STENEMAN and MICHAEL W. YOUNGQUIST,

Petitioners,

—v.—

SECRETARY OF THE NAVY and COMMANDANT OF THE MARINE CORPS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 26, 1973
CERTIORARI GRANTED JANUARY 7, 1974

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5661

FRANCIS A. ADAMS, ROBERT J. STENEMAN
and MICHAEL W. YOUNGQUIST,
Petitioners,

—v.—

SECRETARY OF THE NAVY and
COMMANDANT OF THE MARINE CORPS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

UNITED STATES DISTRICT COURT

Civil Docket 72-1746-FW

Jury demand date:

CAPTAIN FRANCIS A. ADAMS, UNITED STATES MARINE CORPS RESERVE, PLAINTIFF

vs

SECRETARY OF THE NAVY, and COMMANDANT OF THE MARINE CORPS, DEFENDANTS

Complt & Claim for Declaratory Relief & Applic for Writ of Mandamus Armed Forces

For Plaintiff:

Dougherty & Law 838-7222
17291 Irvine Blvd, Tustin, Ca.

Statistical Record	Costs	Date	Name or Receipt No.	Rec.	Disb.
J.S. 5 mailed	Clerk	7/31/72	55215	15—	8/1/72
J.S. 6 mailed	Marshal				
Basis of Action:	Docket fee				
	Witness fees				
Action arose at:	Depositions				

DOCKET ENTRIES

DATE	PROCEEDINGS
7/31/72	Fld Complt & claim for declaratory relief & applic for writ of mandamus. Issd summs. Md JS-5. Armed forces.
8/ 1/72	Fld ord (FW) (WMB) transfrg action to the calander of Judge Whelan for all fur procdgs, Cnsl ntfd.

DOCKET ENTRIES

DATE	PROCEEDINGS
*7/31/72	Fld O.S.C. retable 8/9/72 (FW); Fld T.R.O. (FW); Hrg appln for OSC & TRO & ord TRO grntd & OSC why prelim inj should not issue set for 8/9/72, 1:30 p.m.
8/ 7/72	Fld defts' memo re: similar case, response w/re to opp.
8/ 9/72	Fld pltf's prelim inj re: that defts, their officers, agents, employees, & attys are hereby restrained pdng trial & ultimate disposition of this action, from involuntarily releasing the plf from active duty w/USMC w/o readjustment pay; Hrg OSC why prelim injtcn should not issue & ord prelim injctn grntd.
9/12/72	Fld defts' supplmntl memo in oppstn to prelim injunctn.
9/14/72	Fld retn of summs.
9/15/72	Fld deft's trial memo; Fld plf's stip of facts.
9/19/72	Fld ord (FW) disolving injunctn pdnte lite.
9/22/72	Fld pltf's supple trial brief.
9/25/72	Fld stip of Fact; Fld memo of decision.
10/ 3/72	LODGED plf's proposed judgmnt; LODGED plf's proposed fdngs of fact; LODGED plf's proposed conclsns of law.
10/ 4/72	Fld deft's oppstn to lodged judgmnt.
10/ 5/72	Fld defts Ex Parte motn for ord & Ord (FW) shorteninf time to 10/6/72 at 1:30 pm; affid of Rex Heesman. (WL)

DOCKET ENTRIES

DATE	PROCEEDINGS
*9/18/72	Trial (1st day) Mot plf to vacate prelim injunctn because of mootness grntd & ord prelim injunctn terminated. Stip of facts fld as part of evidenc bef crt. Cnsl to file stip of facts re amt due to plf by 9/25/72 Ord case stand submted upon fing lf addnl stip of facts. eam.
10/ 6/72	Mot of deft ofr stay of execn of judgmnt pending appeal & ord execn judgmnt stayed 30 days.
10/27/72	Fld fndgs of fact; Fld concl of law; Fld jdgmt & ord thereon that pltf is entitled to readjustment pay. In the sum of $9,273.00 & costs of suit. (Ent 10/31/72) Fld ord staying execution of jdgmt. (Ent 10/31/72) JS-6
11/ 3/72	Fld deft's NOTICE OF APPEAL, w/service thereon, copies to (FW) & R.E.
11/13/72	Fld deft's designation of recrd on appl. eam.
12/ 4/72	Rec'd fr C/A cy of ord of C/A staying jdgmnts to USDC pndg appeal. (gave to Ct Clerk NB and to ED)

UNITED STATES DISTRICT COURT

Civil Docket 72-1618-FW

Jury demand date:

CAPTAIN ROBERT J. STENEMAN, UNITED STATES MARINE CORPS RESERVE, PLAINTIFF

vs

SECRETARY OF THE NAVY, and COMMANDANT OF THE MARINE CORPS, DEFENDANTS

Complt and Claim for Declaratory Relief and Application for Writ of Mandamus

—For Reserve Military Readjustment

—Dept of Navy

For Plaintiff:

Dougherty and Law 714-838-7222
17291 Irvine Blvd., Tustin, Ca 92680

Statistical Record	Costs	Date	Name or Receipt No.	Rec.	Disb.
J.S. 5 mailed	Clerk	7/17/72	55025	15—	7/18/72
J.S. 6 mailed	Marshal				
Basis of Action:	Docket fee				
	Witness fees				
Action arose at:	Depositions				

DOCKET ENTRIES

DATE	PROCEEDINGS
7/17/72	Fld Complt and claim for declaratory relief and applic for Writ of mandamus, etc. Issd summs. Md JS-5.; Hrg appln for TRO & OSC & ord TRO grntd & OSC set for hrg 7/27/72, 10 am. Cnsl stip that TRO may remain in full force & effect until 7/31/72, 5 pm & ord hrg on OSC cont to 7/31/72, 2 pm.
7/17/72	Fld pltf's T.R.O.; Fld O.S.C. (FW).
7/27/72	Fld deft's memo in oppos.
7/31/72	Hrg, pt for prelim inj & ord TRO cont in full force & effect until 8/9/72. Ord mot forprelim inj submtd.
8/ 9/72	Fld plf's prelim inj re: that the Secretary of the Navy & Commandant of the Marine Corps etc. are hereby restrained pendng trial & ultimate disposition of this action, from involuntarily releasing the plf from active duty w/USMC w/o readjustment pay, (FW).
8/11/72	Fld pltf's supplemetry memo in support of motn for prelm injunction.
9/12/72	Fld defts' suplmntl memo in oppstn to prelim injunctn.
9/14/72	Fld retn of summs.
9/15/72	Fld defts' trial memo.; Fld stip OF FACTS for plf.
9/19/72	Fld ord (FW) dissolving injunctn pendnt lite.
9/22/72	Fld pltf's supple trial brief.
9/25/72	Fld stip of Fact.; Fld memo of decision.
10/ 3/72	LODGED plf's proposed judgmnt; LODGED plf's proposed fdngs of fact; LODGED plf's proposed conclusns of law.

DOCKET ENTRIES

DATE	PROCEEDINGS
10/ 4/72	Fld deft's oppstn to lodged judgmnt.
10/ 5/72	Fld Ex Parte for ord shortening time to 10/6/72 at 1:30 pm; affd of Rex Heesman.
*9/18/72	Trial (1st day) Mot plf to vacate prelim injuctn because of mootness grntd & ord prelim injunctn terminated. Stip of facts fld as part of evidence bef crt. cnsl to file stip of facts re amt due to plf by 9/25/72. Ord case stand submted upon fing of addnl of facts.
10/ 6/72	Hrg mot deft for stay pending appeal & ord execn of judgmnt stayed for 30 days. KH
10/26/72	Fld fndgs of fact; Fld concl of law;
10/27/72	Fld jdgmt & ord thereon that pltf is entitled to re-adjustment pay in the sum of $9,273.00 & costs of suit. (Ent 10/31/72) Fld ord staying execution of jdgmt. (Ent 10/31/72) JS-6 ntfd prtys
11/ 3/72	Fld deft's NOTICE OF APPEAL, w/service thereon, copies to (FW) & R.E.
11/13/72	Fld defts' designation of record for appl. eam.

UNITED STATES DISTRICT COURT

Civil Docket 72-1619-FW

Jury demand date:

CAPTAIN MICHAEL WILLIAM YOUNGQUIST, UNITED STATES MARINE CORPS RESERVE, PLAINTIFF

vs

SECRETARY OF THE NAVY, and COMMANDANT OF THE MARINE CORPS, DEFENDANTS

Complt and Claim for Declaratory Relief and Application for Writ of Mandamus

—For reserve military readjustment pay

—Dept of Navy

For Plaintiff:

Dougherty and Law 714-838-7222
17291 Irvine Blvd., Tustin, Ca 92680

Statistical Record	Costs	Date	Name or Receipt No.	Rec.	Disb.
J.S. 5 mailed	Clerk	7/17/72	55025	15—	7/18/72
J.S. 6 mailed	Marshal				
Basis of Action:	Docket fee				
	Witness fees				
Action arose at:	Depositions				

DOCKET ENTRIES

DATE	PROCEEDINGS
7/17/72	Fld Complt and claim for declaratory relief and applic for Writ of Mandamus, etc. Issd summs. Md JS-5.

DOCKET ENTRIES

DATE	PROCEEDINGS
7/19/72	Fld Ord (FW) (EC) transfg action to the calendar of Judge Whelan for all fur procdgs. Counsel ntfd.
*7/17/72	Hrg appln for TRO & OSC & ord TRO GRNTD & OSC set for hrg 7/27/72, 10 am. Cnsl stip & ord TRO cont in full force & effect until 7/31/72, 5 pm & hrg on OSC cont to 7/31/72, 2 pm.
7/17/72	Fld O.S.C. (FW) retable 7/27/72 10 am; Fld T.R.O. (FW)
7/27/72	Fld defts' memo re: incorporation of cases.
7/31/72	Hrg mot for prelim inj & ord TRO cont in full force., & effect until 8/9/72. Ord mot for prelim inj submtd.
8/ 4/72	Fld plf's suplmntry memo in support of mot for prelim inj.
8/ 9/72	Fld plf's prelim inj re: that defts, their officers, agents, employees & attys are hereby restrained pendng trial & ultimate disposition of this action, from involuntarily releasing the plf from active duty w/USMC w/o readjustment pay, (FW).
9/12/72	Fld defts' supplmntl memo in oppstn to prelim injunctn.
9/15/72	Fld retn of summs; Fld defts' trial memo; Fld plf's stip of facts.
9/19/72	Fld ord (FW) dissolving injunctn pendnt lite.
9/22/72	Fld pltf's supple trial brief.
9/25/72	Fld stip of Fact.; Fld memo of decision.
10/ 3/72	LODGED plf's proposed judgmnt; LODGED plf's proposed fdngs of fact; LODGED plf's proposed conclusns of law.

DOCKET ENTRIES

DATE	PROCEEDINGS
10/ 4/72	Fld deft's oppstn to lodged judgmnt.
10/ 6/72	Fld defts Ex-Parte motn for ord & Ord for shorting time to 10/6/72; affid of Rex Heesman; Fld deft's not of motn retable 10/6/72 at 1:30 pm for stay of judgmt pending appeal & motn.
*9/18/72	Trial (1st day) Mot plf to vacate prelim injunctn because of mootness grntd & ord prelim injunctn terminated. Stip or facts fld as part of evidence bef Crt. Cnsl to file stip of facts re amt due to plf by 9/25/72. Ord case stand submtd upon fing of addnl stip of facts. eam.
10/ 6/72	Mot deft for stay of execn judgmnt pending appeal & ord execn judgmnt stayed 30 days.
10/27/72	Fld fndgs of fact; Fld concl of law; Fld jdgmt & ord thereon that pltf is entitled to readjustment pay in the sum of $10,065.00 & costs of suit. (Ent 10/31/72) Fld ord staying execution of jdgmt. (Ent 10/31/72) JS-6 ntfd prtys
11/ 3/72	Fld defts NOTICE OF APPEAL, w/service thereon, copies to (FW) & R.E.
11/13/72	Fld defts' designation of record for appl. eam.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 72-1746-WMB

[Filed Jul, 31, 1:55 PM, '72, Clerk U.S. District Court Central Dist. of Calif. By RT]

CAPTAIN FRANCIS A. ADAMS UNITED STATES MARINE CORPS RESERVE, PLAINTIFF

vs.

SECRETARY OF THE NAVY, and COMMANDANT OF THE MARINE CORPS, DEFENDANTS

COMPLAINT AND CLAIM FOR DECLARATORY RELIEF AND APPLICATION FOR WRIT OF MANDAMUS

Plaintiff alleges:

I

This is an action brought pursuant to the Administrative Procedure Act, 5 USC § 701, through § 706, the Federal Declaratory Relief Act, 28 USC § 2201 and 28 USC § 1331, and 28 USC § 1361.

II

Plaintiff is now a commissioned officer in the United States Marine Corps Reserve on active duty with the United States Marine Corps, having served 4 years, 11 months and 16 days of continuous active duty on Monday, July 24, 1972.

III

Plaintiff is a resident of Orange County, Cailfornia.

IV

On or about February of 1972 and again on or about April of 1972 plaintiff made a request to the COMMANDANT OF THE MARINE CORPS to be extended on ac-

tive duty with the United States Marine Corps for an indefinite period to be determined by the Marine Corps, beyond his original expiration of active service date. Said request was denied on May 11, 1972.

V

On May 18, 1972, the COMMANDANT OF THE MARINE CORPS, by Naval Speedletter, ordered plaintiff's commanding general, Commanding General, Third Marine Aircraft Wing, Fleet Marine Force Pacific, Marine Corps Air Station, El Toro, Santa Ana, California, to release plaintiff from active duty on August 15, 1972; such orders to include "these orders constitute involuntary release from active duty not entitled to readjustment pay". A copy is attached as Exhibit "A" and incorporated herein by reference.

VI

On or about May 30, 1972, plaintiff received orders from the United States Marine Corps involuntarily releasing him from active duty on August 15, 1972 without entitlement to readjustment pay. A copy is attached as Exhibit "B" and incorporated herein by reference.

VII

Plaintiff is presently on active duty with the United States Marine Corps and has not been released from active duty as yet; such release, however, is imminent.

VIII

10 United States Code § 687 entitles a member of a reserve component who is released from active duty involuntarily, or because he was not accepted for an additional tour of active duty for which he volunteered after he had completed a tour of active duty and who has completed immediately before his release, at least five years of continuous active duty, to a readjustment payment computed by multiplying his years of active service by two

months basic pay of the grade in which he is serving at the time of his release.

IX

Subparagraph § 687(a) of 10 United States Code states that a part of a year that is six months or more is counted as a whole year and a part of a year that is less than six months is disregarded.

X

Plaintiff is entitled to readjustment pay in the approximate amount of $10,000.00.

XI

On January 22, 1971, the United States Court of Claims held in the case of *Arthur C. Schmid, Jr.* v. *United States* (Ct. CL. No. 493-69) that the plaintiff, a lieutenant in the United States Naval Reserve, was entitled to recover readjustment pay on account of his involuntary release from active duty after four years, six months and twenty-seven days of continuous active duty.

XII

On Novemeber 9, 1971, the Supreme Court of the United States denied ceriorari to the defendant, the United States in the Case of Arthur C. Schmid, Jr. v United States (U.S. Supreme Court No. 71-361, 436 F2d 987).

XIII

On June 15, 1972, plaintiff requested of Headquarters United States Marine Corps that his orders be modified to authorize payment of readjustment pay. On July 12, 1972, plaintiff was notified by Headquarters United States Marine Corps that his orders would not be so modified.

XIV

Plaintiff has exhausted his administrative remedies and now seeks relief from this Court.

WHEREFORE, plaintiff prays judgment:

1. Ordering defendants to authorize modification of the orders releasing him from active duty to include his entitlement to readjustment pay under 10 USC § 687;
2. Ordering defendants to pay said readjustment pay in full;
3. That a preliminary injunction issue restraining defendants from involuntarily releasing plaintiff from active duty with the United States Marine Corps, pending judgment in this suit;
4. For all costs of suit;
5. For such other and further relief as to this Court may seem just and proper.

DOUGHERTY AND LAW

By /s/ William A. Dougherty
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 72-1618-FW

[Filed Jul. 17, 2:27 PM, '72, Clerk U.S. District Court Central Dist. of Calif., By M. M.]

CAPTAIN ROBERT J. STENEMAN,
UNITED STATES MARINE CORPS RESERVE, PLAINTIFF

vs.

SECRETARY OF THE NAVY, and COMMANDANT OF THE MARINE CORPS, DEFENDANTS

COMPLAINT AND CLAIM FOR DECLARATORY RELIEF AND APPLICATION FOR WRIT OF MANDAMUS

Plaintiff alleges:

I

This is an action brought pursuant to the Administrative Procedure Act, 5 USC § 701 through § 706, the Federal Declaratory Relief Act, 28 USC § 2201 and 28 USC § 1331, and 28 USC §1361.

II

Plaintiff is now a commissioned officer in the United States Marine Corps Reserve on active duty with the United States Marine Corps, having served 4 years, 10 months and 19 days of continuous active duty on Monday, July 17, 1972.

III

Plaintiff is a resident of Orange County, California.

IV

On or about January 31, 1972 plaintiff made a request to the COMMANDANT OF THE MARINE CORPS for

extension of his active duty with the United States Marine Corps for an additional period to be determined by the Marine Corps beyond his original expiration of active service date or, in the alternative, for augmentation into the regular Marine Corps as a career officer. On April 27, 1972, said request, in the alternative, was denied.

V

On May 10, 1972, the COMMANDANT OF THE MARINE CORPS, by Naval Speedletter, ordered plaintiff's commanding general, Commanding General, Third Marine Aircraft Wing, Fleet Marine Force, Pacific, Marine Corps Air Station, El Toro (Santa Ana), California, to release plaintiff from active duty on August 1, 1972, such orders to include "These orders constitute involuntary release from active duty/not entitled to readjustment pay". A copy is attached as Exhibit "A" and incorporated herein by reference.

VI

On or before August 1, 1972, plaintiff expects to receive the original orders referred to in paragraph V involuntarily releasing him from active duty on August 1, 1972 without entitlement to readjustment pay.

VII

Plaintiff is presently on active duty with the United States Marine Corps and has not been involuntarily released from active duty as yet; such release, however, is imminent.

VIII

10 United States Code § 687 entitles a member of a reserve component who is released from active duty involuntarily, or because he was not accepted for an additional tour of active duty for which he volunteered after he had completed a tour of active duty and who has completed immediately before his release at least five

years of continuous active duty, to a readjustment payment computed by multiplying his years of active service by two months basic pay of the grade in which he is serving at the time of his release.

IX

Subparagraph § 687(a)(2) of 10 United States Code states that a part of a year that is six months or more is counted as a whole year and a part of a year that is less than six months is disregarded.

X

Plaintiff is entitled to readjustment pay in the approximate amount of $10,000.00.

XI

On January 22, 1971, the United States Court of Claims held in the case of *Arthur C. Schmid, Jr.* v. *United States* (Ct. Cl. No. 493-69) that the plaintiff, a lieutenant in the United States Naval Reserve, was entitled to recover readjustment pay on account of his involuntary release from active duty after four years, six months and twenty-seven days of continuous active duty.

XII

On November 9, 1971, the Supreme Court of the United States denied certiorari to the defendant, the United States in the case of *Arthur C. Schmid, Jr.* v. *United States* (U.S. Supreme Court No. 71-361, 436 F2d 987).

XIII

On May 31, 1972, plaintiff duly submitted a claim to the United States Marine Corps Finance Center, Kansas City, Missouri, for his readjustment pay. Said claim has not been paid.

XIV

On June 20, 1972, plaintiff requested Headquarters, United States Marine Corps that his orders be modified to authorize payment of readjustment pay. His orders have not been so modified.

XV

Plaintiff has exhausted his administrative remedies and now seeks relief from this Court.

WHEREFORE, plaintiff prays judgment:

1. Ordering defendants to authorize modification of the orders releasing him from active duty to include his entitlement to readjustment pay under 10 USC § 687;
2. Ordering defendants to pay said readjustment pay in full;
3. That a preliminary injunction issue restraining defendants from involuntarily releasing plaintiff from active duty with the United States Marine Corps, pending judgment in this suit;
4. For all costs of suit;
5. For such other and further relief as to this Court may seem just and proper.

DOUGHERTY AND LAW

By /s/ William A. Dougherty
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 72-1619-EC

[Filed Jul. 17, 2:28 PM, '72, Clerk U.S. District Court Central Dist. of Calif., By M. M.]

CAPTAIN MICHAEL WILLIAM YOUNGQUIST, UNITED STATES MARINE CORPS RESERVE, PLAINTIFF

vs.

SECRETARY OF THE NAVY, and COMMANDANT OF THE MARINE CORPS, DEFENDANTS

COMPLAINT AND CLAIM FOR DECLARATORY RELIEF AND APPLICATION FOR WRIT OF MANDAMUS

Plaintiff alleges:

I

This is an action brought pursuant to the Administrative Procedure Act, 5 USC § 701 through § 706, the Federal Declaratory Relief Act, 28 USC § 2201 and 28 USC § 1331, and 28 USC § 1361.

II

Plaintiff is now a commissioned officer in the United States Marine Corps Reserve on active duty with the United States Marine Corps, having served 4 years, 10 months and 18 days of continuous duty on Monday, July 17, 1972.

III

Plaintiff is a resident of Orange County, California.

IV

On or about March of 1972 plaintiff made a request to the COMMANDANT OF THE MARINE CORPS to be extended on active duty with the United States Marine Corps for an indefinite period to be determined by the Marine Corps, beyond his original expiration of active service date. Said request was denied on or about April of 1972.

V

On or about May 2, 1972, plaintiff received orders from the United States Marine Corps involuntarily releasing him from active duty on August 1, 1972 without entitlement to readjustment pay. A copy is attached as Exhibit "A" and incorporated herein by reference.

VI

Plaintiff is presently on active duty with the United States Marine Corps and has not been released from active duty as yet; such release, however, is imminent.

VII

10 United States Code § 687 entitles a member of a reserve component who is released from active duty involuntarily, or because he was not accepted for an additional tour of active duty for which he volunteered after he had completed a tour of active duty and who has completed immediately before his release, at least five years of continuous active duty, to a readjustment payment computed by multiplying his years of active service by two months basic pay of the grade in which he is serving at the time of his release.

VIII

Subparagraph § 687(a)(a) of 10 United States Code states that a part of a year that is six months or more is counted as a whole year and a part of a year that is less than six month is disregarded.

IX

Plaintiff is entitled to readjustment pay in the approximate amount of $10,000.00.

X

On January 22, 1971, the United States Court of Claims held in the case of Arthur C. Schmid, Jr. v. United States (CT. Cl. No. 493-69) that the plaintiff, a lieutenant in the United States Naval Reserve, was entitled to recover readjustment pay on account of his involuntary release from active duty after four years, six months and twenty-seven days of continuous active duty.

XI

On November 9, 1971, the Supreme Court of the United States denied certiorari to the defendant, the United States in the case of Arthur C. Schmid, Jr. v. United States (U.S. Supreme Court No. 71-361, 436 F2d 987).

XII

On June 20, 1972, plaintiff requested of Headquarters United States Marine Corps that his orders be modified to authorize payment of readjustment pay. His orders have not been so modified.

XIII

On February 4, 1972, plaintiff duly submitted a claim to the United States Marine Corps Finance Center, Kansas City, Missouri, for his readjustment pay. Said claim has not been paid.

XIV

Plaintiff has exhausted his administrative remedies and now seeks relief from this Court.

WHEREFORE, plaintiff prays judgment:

1. Ordering defendants to authorize modification of the orders releasing him from active duty to include his entitlement to readjustment pay under 10 USC § 687;
2. Ordering defendants to pay said readjustment pay in full;
3. That a preliminary injunction issue restraining defendants from involuntarily releasing plaintiff from active duty with the United States Marine Corps, pending judgment in this suit;
4. For all costs of suit;
5. For such other and further relief as to this Court may seem just and proper.

DOUGHERTY AND LAW

By /s/ William A. Dougherty
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed Sep. 25, 1972, Clerk, U. S. District Court Central District of Calif.]

No. 72-1618-FW

CAPTAIN ROBERT J. STENEMAN, UNITED STATES MARINE CORPS RESERVE, PLAINTIFF

v.

SECRETARY OF THE NAVY, and COMMANDANT OF THE MARINE CORPS, DEFENDANTS

No. 72-1619-FW

CAPTAIN MICHAEL WILLIAM YOUNGQUIST, UNITED STATES MARINE CORPS RESERVE, PLAINTIFF

v.

SECRETARY OF THE NAVY, and COMMANDANT OF THE MARINE CORPS, DEFENDANTS

No. 72-1746-FW

CAPTAIN FRANCIS A. ADAMS, UNITED STATES MARINE CORPS RESERVE, PLAINTIFF

v.

SECRETARY OF THE NAVY, and COMMANDANT OF THE MARINE CORPS, DEFENDANTS

MEMORANDUM OF DECISION

In these three actions the cases came on for trial upon stipulated facts. The cases were submitted for decision. The Court has considered the facts and the law. The

Court will give judgment for each plaintiff in the amount set forth in the supplemental stipulation of facts applicable to his case which now has been filed and will order defendants to pay forthwith such amount to such plaintiff. The cases came on for trial on September 18, 1972, and the Court stated that they would stand submitted for decision after the filing of a stipulation in each of the cases setting forth the amount of money claimed by each plaintiff.

The basis of the Court's decision is that each of the plaintiffs had served for more than four and one-half years on active duty in the United States Marine Corps at the time set by defendants as termination date of the active duty service of each plaintiff. This Court concludes that the applicable statute, therefore, requires that each of the plaintiffs receive adjustment benefits upon being terminated by the United States Marine Corps.

The Court has jurisdiction over this matter in that it is a suit against the named defendants in their official capacity, and the suit is for an order adjudicating that plaintiffs are entitled to recover and that defendants make payment on the basis that the action of the defendants in denying the adjustment benefits to the plaintiffs is against the law, and that this Court has jurisdiction to review such erroneous action of defendants and that the Court has jurisdiction to order the payment of the amounts mentioned to plaintiffs respectively.

No injunction will be issued in this case for the reason that the need for injunction is now moot and the preliminary injunction heretofore entered in each of the cases has been discharged for mootness. The Court does not base its decision upon the fact that each of the plaintiffs has now served more than five years on active service for the reason that each of the plaintiffs has served in fact more than five years on active service only because of the issuance by this Court of preliminary injunction enjoining defendants from terminating each of such plaintiffs unless the adjustment benefits were paid coincidental with termination. The Court will order payment to plaintiffs forthwith or at the time of

their respective severance from active duty if they have not already been so severed.

No judgment shall be entered until the Court has signed a formal judgment.

Counsel for plaintiffs shall in each case prepare, serve and lodge findings of fact, conclusions of law, and judgment. This shall be done promptly. The basic facts and conclusions of law of the Court are set forth in this memorandum but the findings of fact and conclusions of law to be prepared by counsel for plaintiffs shall include details of fact and conclusions of law which are not included in this memorandum, and such findings of fact and conclusions of law are not to be inconsistent herewith.

DATED this 25 day of September, 1972.

/s/ Francis C. Whelan
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 72-1746-FW

[Filed Oct. 27, 1972, Clerk U. S. District Court Central District of Calif.]

[Lodged Oct. 3, 10:18 AM '72, Clerk U.S. District Court Central Dist. of Calif., By —]

CAPTAIN FRANCIS A. ADAMS, UNITED STATES MARINE CORPS RESERVE, PLAINTIFF

—*vs.*—

SECRETARY OF THE NAVY, and COMMANDANT OF THE MARINE CORPS, DEFENDANTS

FINDINGS OF FACT

1. This is an action against the named defendants in their official capacity seeking an order adjudicating that plaintiff is entitled to recover and that defendants make payment on the basis that defendants' denial of readjustment pay to plaintiff is against the law.

2. Plaintiff, an officer in the United States Marine Corps Reserve, served in excess of four and one-half, but less than five years of continuous active duty with the United States Marine Corps immediately prior to the date set by defendants for the termination of plaintiff's active duty.

3. At time of trial of this action plaintiff had served in excess of five years of continuous active duty with the United States Marine Corps.

4. During his tour of active duty with the United States Marine Corps, plaintiff unconditionally volunteered for an extension of his active duty beyond his original expiration of active service date.

5. The Commandant of the Marine Corps disapproved plaintiff's request for an extension of active duty with the United States Marine Corps.

6. The Commandant of the Marine Corps ordered that the plaintiff be involuntarily released from active duty with the United States Marine Corps.

7. Plaintiff's release from active duty with the United States Marine Corps was, or if not yet effected, will be an involuntary release from active duty.

8. At the time of trial plaintiff's basic pay per month was $927.30.

9. Plaintiff is entitled to readjustment pay upon his release from active duty with the United States Marine Corps in the sum of $9,273.00.

10. Plaintiff exhausted his administrative remedies prior to filing the action herein.

DATED this 26th day of October 1972.

/s/ Francis C. Whelan
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 72-1618-FW

[Filed Oct. 26, 1972, Clerk, U. S. District Court Central District of Calif.]

[Lodged Oct. 3 10:19 AM '72, Clerk U.S. District Court Central Dist. of Calif., By —]

CAPTAIN ROBERT J. STENEMAN, UNITED STATES MARINE CORPS RESERVE, PLAINTIFF

—*vs.*—

SECRETARY OF THE NAVY, and COMMANDANT OF THE MARINE CORPS, DEFENDANTS

FINDINGS OF FACT

1. This is an action against the named defendants in their official capacity seeking an order adjudicating that plaintiff is entitled to recover and that defendants make payment on the basis that defendants' denial of readjustment pay to plaintiff is against the law.

2. Plaintiff, an officer in the United States Marine Corps Reserve, served in excess of four and one-half, but less than five years of continuous active duty with the United States Marine Corps immediately prior to the date set by defendants for the termination of plaintiff's active duty.

3. At time of trial of this action plaintiff had served in excess of five years of continuous active duty with the United States Marine Corps.

4. During his tour of active duty with the United States Marine Corps, plaintiff unconditionally volunteered for an extension of his active duty beyond his original expiration of active service date.

5. The Commandant of the Marine Corps disapproved plaintiff's request for an extension of active duty with the United States Marine Corps.

6. The Commandant of the Marine Corps ordered that the plaintiff be involuntarily released from active duty with the United States Marine Corps.

7. Plaintiff's release from active duty with the United States Marine Corps was, or if not yet effected, will be an involuntary release from active duty.

8. At the time of trial plaintiff's basic pay per month was $927.30.

9. Plaintiff is entitled to readjustment pay upon his release from active duty with the United States Marine Corps in the sum of $9,273.00.

10. Plaintiff exhausted his administrative remedies prior to filing the action herein.

DATED this 26th day of October 1972.

/s/ Francis C. Whelan
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 72-1619-FW

[Filed Oct. 27, 1972, Clerk, U. S. District Court Central District of Calif.]

[Lodged Oct. 3, 10:18 AM '72, Clerk, U.S. District Court Central Dist. of Calif., By —]

CAPTAIN MICHAEL WILLIAM YOUNGQUIST, UNITED STATES MARINE CORPS RESERVE, PLAINTIFF

—*vs.*—

SECRETARY OF THE NAVY, and COMMANDANT OF THE MARINE CORPS, DEFENDANTS

FINDINGS OF FACT

1. This is an action against the named defendants in their official capacity seeking an order adjudicating that plaintiff is entitled to recover and that defendants make payment on the basis that defendants' denial of readjustment pay to plaintiff is against the law.

2. Plaintiff, an officer in the United States Marine Corps Reserve, served in excess of four and one-half, but less than five years of continuous active duty with the United States Marine Corps immediately prior to the date set by defendants for the termination of plaintiff's active duty.

3. At time of trial of this action plaintiff had served in excess of five years of continuous active duty with the United States Marine Corps.

4. During his tour of active duty with the United States Marine Corps, plaintiff unconditionally volunteered for an extension of his active duty beyond his original expiration of active service date.

5. The Commandant of the Marine Corps disapproved plaintiff's request for an extension of active duty with the United States Marine Corps.

6. The Commandant of the Marine Corps ordered that the plaintiff be involuntarily released from active duty with the United States Marine Corps.

7. Plaintiff's release from active duty with the United States Marine Corps was, or if not yet effected, will be an involuntary release from active duty.

8. At the time of trial plaintiff's basic pay per month was $1,006.50.

9. Plaintiff is entitled to readjustment pay upon his release from active duty with the United States Marine Corps in the sum of $10,065.00.

10. Plaintiff exhausted his administrative remedies prior to filing the action herein.

DATED this 26th day of October 1972.

/s/ Francis C. Whelan
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 72-1746-FW

[Filed Oct. 27, 1972, Clerk U. S. District Court Central District of Calif.]

[Lodged Oct. 3, 10:19 AM '72, Clerk, U.S. District Court Central District of Calif., By —]

CAPTAIN FRANCIS A. ADAMS, UNITED STATES MARINE CORPS RESERVE, PLAINTIFF

—*vs.*—

SECRETARY OF THE NAVY, and COMMANDANT OF THE MARINE CORPS, DEFENDANTS

CONCLUSIONS OF LAW

1. This action arises out of a claim under a law of the United States of America, specifically Title 10, United States Code § 687.

2. Title 28, United States Code § 1361 grants this Court original jurisdiction of this action in that plaintiff seeks to compel officers and employees of the United States to perform a duty owed to him.

3. The same § 1361 of Title 28, United States Code and Title 28, United States Code § 1346 grant this Court jurisdiction to order payment in the amount of $9,273.00.

4. Title 5, United States Code § 701 through § 706 grant this Court jurisdiction to review the denial of benefits to plaintiff complained of herein and to compel payment by the named defendants acting in their official capacity for the United States of America. Plaintiff has exhausted his administrative remedies.

5. Subsection 687(a)(2) of Title 10, United States Code, which states "a part of a year that is six months or more is counted as a whole year and a part of a year that is less than six months is disregarded" must be in-

terpreted to refer to entitlement to or eligibility for readjustment pay as well as computation of the amount of readjustment pay due to a serviceman under the statute.

6. Under the computation provisions of Title 10, United States Code § 687, plaintiff's readjustment pay is computed by multiplying five years of active service by two months basic pay of the grade in which plaintiff is serving at the time of his release from active duty.

7. Under the provisions of Subsection 687(a)(2) of Title 10, plaintiff is entitled to receive readjustment pay at the time of his severance from active duty, he having served on active duty for more than four years and six months at the time set by defendants for the termination of plaintiff's active duty.

8. Where plaintiff during his tour of active duty unconditionally volunteered for an extension of his active duty beyond his original expiration of active service date, he is entitled to readjustment pay upon his severance from active duty in the sum of $9,273.00 when he has completed more than four years and six months on active duty prior to the time that is set as the date of his severance from active duty. He need not have served five years on active duty at the time set for his said severance in view of the language of Subsection 687(a)(2) of Title 10 that a part of a year that is six months or more is counted as a whole year.

DATED this 26th day of October 1972.

/s/ Francis C. Whelan
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 72-1618-FW

[Filed Oct. 26, 1972, Clerk, U. S. District Court Central District of Calif.]

[Lodged Oct. 3, 10:19 AM '72, Clerk, U.S. District Court Central District of Calif., By —]

CAPTAIN ROBERT J. STENEMAN, UNITED STATES MARINE CORPS RESERVE, PLAINTIFF

—*vs.*—

SECRETARY OF THE NAVY, and COMMANDANT OF THE MARINE CORPS, DEFENDANTS

CONCLUSIONS OF LAW

1. This action arises out of a claim under a law of the United States of America, specifically Title 10, United States Code § 687.

2. Title 28, United States Code § 1361 grants this Court original jurisdiction of this action in that plaintiff seeks to compel officers and employees of the United States to perform a duty owed to him.

3. The same § 1361 of Title 28, United States Code and Title 28, United States Code § 1346 grant this Court jurisdiction to order payment in the amount of $9,273.00.

4. Title 5, United States Code § 701 through § 706 grant this Court jurisdiction to review the denial of benefits to plaintiff complained of herein and to compel payment by the named defendants acting in their official capacity for the United States of America. Plaintiff has exhausted his administrative remedies.

5. Subsection 687(a)(2) of Title 10, United States Code, which states "a part of a year that is six months or more is counted as a whole year and a part of a year that is less than six months is disregarded" must be in-

terpreted to refer to entitlement to or eligibility for readjustment pay as well as computation of the amount of readjustment pay due to a serviceman under the statute.

6. Under the computation provisions of Title 10, United States Code § 687, plaintiff's readjustment pay is computed by multiplying five years of active service by two months basic pay of the grade in which plaintiff is serving at the time of his release from active duty.

7. Under the provisions of Subsection 687(a)(2) of Title 10, plaintiff is entitled to receive readjustment pay at the time of his severance from active duty, he having served on active duty for more than four years and six months at the time set by defendants for the termination of plaintiff's active duty.

8. Where plaintiff during his tour of active duty unconditionally volunteered for an extension of his active duty beyond his original expiration of active service date, he is entitled to readjustment pay upon his severance from active duty in the sum of $9,273.00 when he has completed more than four years and six months on active duty prior to the time that is set as the date of his severance from active duty. He need not have served five years on active duty at the time set for his said severance in view of the language of Subsection 687(a)(2) of Title 10 that a part of a year that is six months or more is counted as a whole year.

DATED this 26th day of October 1972.

/s/ Francis C. Whelan
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 72-1619-FW

[Filed Oct. 27, 1972, Clerk U. S. District Court Central District of Calif.]

[Lodged Oct. 3, 10:18 AM '72, Clerk U.S. District Court Central District of Calif., By —]

CAPTAIN MICHAEL WILLIAM YOUNGQUIST, UNITED STATES MARINE CORPS RESERVE, PLAINTIFF

—*vs.*—

SECRETARY OF THE NAVY, and COMMANDANT OF THE MARINE CORPS, DEFENDANTS

CONCLUSIONS OF LAW

1. This action arises out of a claim under a law of the United States of America, specifically Title 10, United States Code § 687.

2. Title 28, United States Code § 1361 grants this Court original jurisdiction of this action in that plaintiff seeks to compel officers and employees of the United States to perform a duty owed to him.

3. The same § 1361 of Title 28, United States Code and Title 28, United States Code § 1331 grant this Court jurisdiction to order payment in the amount of $10,065.00.

4. Title 5, United States Code § 701 through § 706 grant this Court jurisdiction to review the denial of benefits to plaintiff complained of herein and to compel payment by the named defendants acting in their official capacity for the United States of America. Plaintiff has exhausted his administrative remedies.

5. Subsection 687(a)(2) of Title 10, United States Code, which states "a part of a year that is six months or more is counted as a whole year and a part of a year that is less than six months is disregarded" must be in-

terpreted to refer to entitlement to or eligibility for readjustment pay as well as computation of the amount of readjustment pay due to a serviceman under the statute.

6. Under the computation provisions of Title 10, United States Code § 687, plaintiff's readjustment pay is computed by multiplying five years of active service by two months basic pay of the grade in which plaintiff is serving at the time of his release from active duty.

7. Under the provisions of Subsection 687(a)(2) of Title 10, plaintiff is entitled to receive readjustment pay at the time of his severance from active duty, he having served on active duty for more than four years and six months at the time set by defendants for the termination of plaintiff's active duty.

8. Where plaintiff during his tour of active duty unconditionally volunteered for an extension of his active duty beyond his original expiration of active service date, he is entitled to readjustment pay upon his severance from active duty in the sum of $10,065.00 when he has completed more than four years and six months on active duty prior to the time that is set as the date of his severance from active duty. He need not have served five years on active duty at the time set for his said severance in view of the language of Subsection 687(a)(2) of Title 10 that a part of a year that is six months or more is counted as a whole year.

DATED this 26th day of October 1972.

/s/ Francis C. Whelan
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 72-1746-FW

[Filed Oct. 27, 1972, Clerk, U. S. District Court Central District of Calif.]

[Entered Oct. 31, 1972, Clerk, U. S. District Court Central District of California, By —— Deputy]

CAPTAIN FRANCIS A. ADAMS, UNITED STATES MARINE CORPS RESERVE, PLAINTIFF

—*vs.*—

SECRETARY OF THE NAVY, and COMMANDANT OF THE MARINE CORPS, DEFENDANTS

JUDGMENT

This action having come on for hearing before the Court, Honorable Francis C. Whelan, District Judge Presiding, William A. Dougherty appearing for plaintiff and Assistant United States Attorney Rex Heeseman appearing for defendants, and the issues having been duly heard and a Memorandum of Decision having been duly rendered and Findings of Fact and Conclusions of Law having been made by the Court;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff is entitled to readjustment pay under 10 U.S. Code § 687 in the sum of $9,273.00; that judgment be entered in favor of plaintiff in said amount and that the Secretary of the Navy and Commandant of the Marine Corps and their officers, agents and employees and specifically, the Commanding General and the Disbursing Officer at Marine Corps Air Station, El Toro, California, pay plaintiff said amount forthwith or at the time of his severance from active duty if he has not already been so severed.

IT IS FURTHER ORDERED that plaintiff be granted costs of suit.

Dated: October 27, 1972.

/s/ Francis C. Whelan
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 72-1618-FW

[Filed Oct. 27, 1972, Clerk, U. S. District Court Central District of Calif.]

[Entered Oct. 31, 1972, Clerk, U. S. District Court Central District of California, By —— Deputy]

CAPTAIN ROBERT J. STENEMAN, UNITED STATES MARINE CORPS RESERVE, PLAINTIFF

—*vs.*—

SECRETARY OF THE NAVY, and COMMANDANT OF THE MARINE CORPS, DEFENDANTS

JUDGMENT

This action having come on for hearing before the Court, Honorable Francis C. Whelan, District Judge Presiding, William A. Dougherty appearing for plaintiff and Assistant United States Attorney Rex Heeseman appearing for defendants, and the issues having been duly heard and a Memorandum of Decision having been duly rendered and Findings of Fact and Conclusions of Law having been made by the Court;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff is entitled to readjustment pay under 10 U.S. Code § 687 in the sum of $9,273.00; that judgment be entered in favor of plaintiff in said amount and that the Secretary of the Navy and Commandant of the Marine Corps and their officers, agents and employees and specifically, the Commanding General and the Disbursing Officer at Marine Corps Air Station, El Toro, California, pay plaintiff said amount forthwith or at the time of his severance from active duty if he has not already been so severed.

IT IS FURTHER ORDERED that plaintiff be granted costs of suit.

Dated: October 27, 1972.

/s/ Francis C. Whelan
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 72-1619-FW

[Filed Oct. 27, 1972, Clerk, U. S. District Court Central District of Calif.]

CAPTAIN MICHAEL WILLIAM YOUNGQUIST, UNITED STATES MARINE CORPS RESERVE, PLAINTIFF

—*vs.*—

SECRETARY OF THE NAVY, and COMMANDANT OF THE MARINE CORPS, DEFENDANTS

JUDGMENT

This action having come on for hearing before the Court, Honorable Francis C. Whelan, District Judge Presiding, William A. Dougherty appearing for plaintiff and Assistant United States Attorney Rex Heeseman appearing for defendants, and the issues having been duly heard and a Memorandum of Decision having been duly rendered and Findings of Fact and Conclusions of Law having been made by the Court;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff is entitled to readjustment pay under 10 U.S. Code § 687 in the sum of $10,065.00; that judgment be entered in favor of plaintiff in said amount and that the Secretary of the Navy and Commandant of the Marine Corps and their officers, agents and employees and specifically, the Commanding General and the Disbursing Officer at Marine Corps Air Station, El Toro, California, pay plaintiff said amount forthwith or at the time of his severance from active duty if he has not already been so severed.

IT IS FURTHER ORDERED that plaintiff be granted costs of suit.

Dated: October 27, 1972.

/s/ Francis C. Whelan
United States District Judge

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72-2633

DONALD C. CASS, APPELLEE

vs.

UNITED STATES OF AMERICA, APPELLANT

Nos. 72-3028, 72-3029, 72-3030
FRANCIS A. ADAMS, ROBERT J. STENEMAN,
MICHAEL W. YOUNGQUIST, APPELLEES

vs.

SECRETARY OF THE NAVY, ET AL., APPELLANTS

[August 1, 1973]

72-2633—Appeal from the United States District Court, District of Montana, Helena Division
72-3028) Appeal from the United States District
72-3029) Court, Central District of California
72-3030)

Before: MERRILL and CHOY, Circuit Judges, and CONTI,* District Judge

CONTI, D.J.:

This case involves the interpretation of 10 U.S.C. 687 (a), which permits servicemen to receive readjustment payments upon release from the armed forces. Two is-

* Honorable Samuel Conti, United States District Judge, Northern District of California, sitting by designation.

sues are involved in this appeal: (1) Whether the "rounding provision" of subparagraph (2) of 10 U.S.C. 687(a) applies to reduce the eligibility requirement for readjustment pay; and (2) whether the preliminary injunction issued by the District Court in the Adams-Steneman-Youngquist cases would moot this appeal because they would now qualify under any interpretation of the statute.

These actions were instituted by reserve officers on active duty in the Armed Forces. Each had served more than four and a half years and less than five years. Cass was honorably and involuntarily discharged from the Army. Adams, Steneman and Youngquist, captains in the Marine Corps, were ordered to be involuntarily released from active duty under honorable circumstances, but obtained a preliminary injunction which prevented their release until after they had served more than five years. The preliminary injunction was then dissolved while their cases were still pending. In all the cases the trial courts found in favor of the plaintiffs.

With regard to the substantive issue of whether or not 10 U.S.C. 687(a)(2) was properly interpreted by the district court, it is the opinion of this court that it was not.

The relevant statute provides in pertinent part:

> ". . . a member of a reserve component . . . who is released from active duty involuntarily . . . who has completed, immediately before release, at least five years of continuous active duty, is entitled to a readjustment payment computed by multiplying his years of active service . . . by two months' basic pay of the grade in which he is serving at the time of his release . . . For the purposes of this subsection—
>
> (1) a period of active duty is continuous if it is not interrupted by a break in service of more than 30 days;
>
> (2) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded . . ."

The district courts ruled in favor of plaintiffs, following the rationale of *Schmid v. United States*, 436 F.2d 987 (Ct.Cls.) cert. denied 404 U.S. 951 (1971). In *Schmid* the court of claims decided that the rounding provision of 687(a)(2) that "a part of a year that is six months or more is counted as a whole year" applied not only for the purposes of calculating the amount of the readjustment pay owed servicemen eligible for payments, but also in determining whether the five year eligibility requirement was met. Thus, if appellees' position is correct, their time in service (more than four and a half years) was properly rounded off to five years in the district courts and they were thus eligible and entitled to readjustment payments under 10 U.S.C. 687(a). We disagree and reverse.

The concept of readjustment pay was originally made into law in 1956. That Act of July 9, 1956, 70 Stat. 517, 50 U.S.C. 1016(a) (1958 ed.) provided in pertinent part:

> "A member of a reserve component who is involuntarily released from active duty after the enactment of this section and after having completed immediately prior to such release at least five years of continuous active duty, except for a break in service of not more than thirty days . . . is entitled to a lump-sum readjustment payment computed on the basis of one-half of one month's basic pay in the grade in which he is serving at the time of release from active duty for each year of active service ending at the close of the eighteenth year. *For the purpose of computing the amount of readjustment payment (1) a part of a year that is six months or more is counted as a whole year . . .*" (Emphasis added)

Thus, that Act clearly provided that the rounding provision applied only to the determination of the amount of payment, and not to the eligibility requirement. In 1962, the statute was codified into its present form.

The present form of the statute does not explicitly limit the rounding provisions to computation of the amount of

the benefits. However, the clause of the statute which sets the minimum eligibility at five years, appears to be clear on its face and not subject to the interpretation given it by the court in *Schmid*.

However, even if the statute is arguably ambiguous, the result is unchanged. The rounding provisions conflict with the clear statement that five years is required for eligibility, if the rounding provision applies to eligibility. The use of the rounding provision would serve no useful purpose in determining eligibility. Eligibility is defined in terms of a fixed duration under the statute. The rounding provision could only be applicable in a situation in which a serviceman had served between four and a half and five years. There is no apparent reason why Congress would choose such a circuitous method to determine eligibility.

An examination of the legislative history behind the 1956 and 1962 versions of the statute supports the interpretation argued by appellant. The senate hearings on the 1956 bill specifically considered and adopted the language which limited the rounding provision to the computation of the amount of the payment. 1956-2 U.S. Code Cong. & Ad. News, pp. 3068, 3070.

In 1962, Congress codified the readjustment payment laws. In the process the language that the rounding provision was limited to the computation of the amount of readjustment pay was deleted. However, the senate report on the new law stated that the bill "is not intended to make any substantive change in the existing law". Senate Report No. 1876, 87th Cong. 2d Sess., 1962 U.S. Code & Ad. News, p. 2456. It would be inconsistent with the above declaration for this court to construe that Congress intended to broaden the eligibility requirements. Therefore, we reverse on the substantive issue of interpretation of 10 U.S.C. 687(a).

With regard to the arguments of Adams, Steneman and Youngquist that the preliminary injunction issued by the district court in their cases served to make them eligible for readjustment benefits under any interpretation of the statute, we disagree.

The case of *Paul v. Seamens*, 468 F.2d 361 (1st Cir. 1972), held that a preliminary injunction designed to preserve the status quo, cannot count toward retirement benefits. In the case at bar, we have decided for appellant, and therefore the injunction in the district court was improperly issued, and cannot be relied upon to support eligibility for readjustment benefits.

The injunction created no additional rights in appellees that they did not have under the statute in question. Any other decision would allow appellants to "bootstrap" themselves into eligibility.

Therefore, the decisions of the district court are reversed.

SUPREME COURT OF THE UNITED STATES

No. 73-5661

FRANCIS A. ADAMS, ET AL., PETITIONERS

v.

SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is consolidated with No. 73-604 and a total of one hour is allotted for oral argument.

January 7, 1974

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 532243 182

INDEX

AUTHORITIES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

DONALD C. CASS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Donald C. Cass, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered on August 1, 1973, which reversed a judgment of the United States District Court of the District of Montana. The District Court held that the petitioner was eligible for readjustment pay under 10 USC § 687(a).

OPINIONS BELOW

The opinion of the United States District Court for the District of Montana dated June 20, 1972 has been published at 344 F.Supp. 550, and is printed herein as Appendix A. The opinion of the Court of Appeals for the Ninth Circuit dated August 1, 1973 has not yet been published and is printed herein as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 1, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Is an individual involuntarily released from active duty with the Armed Forces entitled to readjustment pay in accordance with 10 USC § 687(a) where such individual has served more than four years and six months, but less than five years, of continuous active duty?

STATUTORY PROVISION INVOLVED

10 U.S.C. § 687 (a) provides in pertinent part:

> "Non-Regulars: readjustment payment upon involuntary release from active duty
>
> (a) Except for members covered by subsection (b), a member of a reserve component or a member of the Army or the Air Force without component who is released from active duty involuntarily, or because he was not accepted for an additional tour of active duty for which he volunteered after he had completed a tour of active duty, and who has completed, immediately before his release, at least five years of continuous active duty, is entitled to a readjustment payment computed by multiplying his years of active service (other than in time of war or of national emergency declared by Con-

gress after June 28, 1962), but not more than eighteen, by two months' basic pay of the grade in which he is serving at the time of his release. * * * For the purposes of this subsection—

(1) a period of active duty is continuous if it is not interrupted by a break in service of more than 30 days;

(2) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded; and

(3) a period for which the member concerned has received readjustment pay under another provision of law may not be included."

STATEMENT OF FACTS

As a member of the United States Army Reserve, the petitioner served a tour of active duty with the United States Army from July 16, 1966 to April 26, 1971 at which time the petitioner was honorably and involuntarily released from active duty, having completed four (4) years, nine (9) months and thirteen (13) days of continuous active duty. At the time of his involuntary release from active duty petitioner had attained the rank of Captain and was receiving a base pay of $1,063.80 per month.

On April 20, 1971, petitioner requested from the Department of the Army a lump-sum readjustment payment in the sum of $10,638.00 which was the amount of readjustment payment due calculated in accordance with the provisions of 10 U.S.C. § 687 (a) under the assumption that petitioner was eligible for a readjustment payment. Petitioner's request was denied.

Petitioner brought suit against the United States in the United States District Court for the District of

Montana and for jurisdictional purposes waived all readjustment pay due in excess of $10,000. The parties stipulated to the above recited facts and agreed that on the basis of these facts the District Court should determine whether petitioner was entitled to the readjustment payment prayed for in accordance with 10 U.S.C. § 687(a).

The District Court relied upon the decision of the Court of Claims in *Schmid* v. *United States,* 436 F.2d 987 (Ct.Cl.), (1971), *cert. denied,* 404 U.S. 951, in concluding that the rounding provision, 10 U.S.C. § 687(a)(2), applies to both eligibility for and the computation of a readjustment payment. The District Court therefore entered judgment for petitioner in the sum of $10,000. The *Schmid* decision is printed herein as Appendix C.

The Government appealed the District Court's decision to the Court of Appeals for the Ninth Circuit. The Court of Appeals reversed, rejecting the interpretation of 10 U.S.C. § 687(a)(2) rendered by the Court of Claims in *Schmid* and relied upon by the District Court. The Court of Appeals concluded that the rounding provision of 10 U.S.C. § 687(a) applies only to the determination of the amount of readjustment payment, and not to the eligibility requirement for readjustment pay.

REASONS FOR GRANTING THE WRIT

The Decision of the Court of Appeals for the Ninth Circuit Directly Conflicts with a Recent Decision of the Court of Claims

The decision of the Court of Appeals for the Ninth Circuit is in direct conflict with the case of *Schmid* v. *United States,* 436 F.2d 987 (Ct.Cl.), *cert. de-*

nied, 404 U.S. 951 (1971). The Court of Claims held in *Schmid* that 10 U.S.C. § 687(a) requires only four years and six months of continuous active duty in order for an individual involuntarily released from active duty to be eligible for a readjustment payment. The Court of Claims concluded:

> We find that the section is clear and unambiguous on its face and is susceptible, on its face, of only one interpretation. The relevant part of the last sentence of section 687(a) provides that "For the purposes of this subsection * * * (2) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded * * *. Congress imposed no express or implied limitation on the applicability of this rounding provision. The clear indication is that, in determining eligibility for readjustment pay and in computing the amount thereof, a period of 6 months or more is counted as a whole year. 436 F.2d at 989.

Additionally, after a review of the legislative history of § 687(a), as urged by the Government, the Court of Claims nevertheless concluded that the intent of Congress was in accord with the plain meaning of 10 U.S.C. § 687(a).

In reversing the decision of the District Court for the District of Montana, the Court of Appeals for the Ninth Circuit expressly rejected the rationale of the Court of Claims in *Schmid* and held that 10 U.S.C. § 687(a) was clear on its face in requiring five years of continuous active duty in order to confer eligibility for a readjustment payment. The Ninth Circuit also held that the legislative history behind 10 U.S.C. § 687(a) supports this interpretation. The petitioner submits that the Ninth Circuit erred in not following the rationale set forth in *Schmid*.

The Supreme Court has in the past acted to resolve a conflict between a decision of a circuit court and a decision of the United States Court of Claims. See *Waterman S.S. Corp.* v *United States,* 381 U.S. 252 (1965); *United States* v. *Zacks,* 375 U.S. 59 (1963); *United States* v. *Gilmore,* 372 U.S. 39 (1963); *American Auto. Ass'n.* v. *United States,* 367 U.S. 687 (1961); *United States v. Consol. Edison Co.,* 366 U.S. 380 (1961). A resolution of the issue involved in this case by this Court is particularly desirable since there are other cases pending involving this identical issue in the Court of Claims, the Court of Appeals for the Seventh Circuit and at least two district courts. A summary of the pending cases is printed at Appendix D. There are hundreds, if not thousands, of individuals who have been and may be involuntarily released from active duty with at least four years and six months, but less than five years, of continuous active duty, and therefore the issue involved in this case is of great importance to past and present members of the Armed Forces and to the Government.

CONCLUSION

The requested Writ of Certiorari should be granted in order to resolve the conflict between the decision of the Court of Claims in *Schmid* v. *United States* and the decision of the Ninth Circuit Court of Appeals in *Cass* v. *United States.*

Respectfully submitted,

ARTHUR B. HANSON
ARTHUR A. BIRNEY
JOHN N. FENRICH, JR.
Hanson, O'Brien, Birney,
Stickle & Butler
888 Seventeenth Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioners

Of Counsel:

CHARLES A. SMITH
Smith & Harper
2210 North Roberts
Helena, Montana 59601

APPENDIX

APPENDIX

APPENDIX A

Opinion of the United States District Court for the District of Montana

Dated June 20, 1972

DONALD C. CASS, *Plaintiff*

v.

UNITED STATES OF AMERICA, *Defendant.*

Civ. No. 2014.

UNITED STATES DISTRICT COURT,
D. MONTANA,
HELENA DIVISION.

JUNE 20, 1972.

Proceeding on claim of involuntarily released officer for readjustment pay. The District Court, Russell E. Smith, C.J., held that rounding provision in statute providing for readjustment pay upon involuntary release from active duty applies to both eligibility for and computation of readjustment pay; thus, officer who was involuntarily released from active duty after serving four years, nine months, and thirteen days of continuous active duty was entitled to readjustment pay.

Judgment for plaintiff.

Armed Services § 13.1(16)

Rounding provision in statute providing for readjustment pay upon involuntary release from active duty applies to both eligibility for and computation of readjustment pay; thus, officer who was involuntarily released from active duty after serving four years, nine months, and thirteen days of continuous active duty was entitled to readjustment pay. 10 U.S.C.A. § 687(a) (2).

Charles A. Smith, Smith & Harper, Helena Mont., for plaintiff.

Otis L. Packwood, U. S. Atty., Billings, Mont., for defendant.

OPINION AND ORDER

RUSSELL E. SMITH, Chief Judge.

This case was submitted on an agreed statement of facts which is adopted as the findings of the court.

Plaintiff, Donald C. Cass, was a member of the United States Army Reserve and served a tour of active duty with the Army from July 16, 1966, to April 26, 1971—four years, nine months, and 13 days of continuous active duty. Cass was honorably and involuntarily released from active duty on April 26, 1971, and as Captain was then receiving base pay of $1,063.80 per month. Upon notification that he was released, Cass requested a lump-sum readjustment payment as provided by 10 U.S.C. § 687(a). The request was refused because Cass had not served a full five years.

Cass seeks the amount of readjustment pay due, $10,638.00, but for jurisdictional purposes has waived all in excess of $10,000.00.

The statute in question reads as follows:

> § 687(a) . . . a member of the Army or the Air Force without component who is released from active duty involuntarily, . . . and who has completed, immediately before his release, at least five years of continuous active duty, is entitled to a readjustment payment computed by multiplying his years of active service . . . but not more than eighteen, by two months' basic pay of the grade in which he is serving at the time of his release. * * * *For the purposes of this subsection—*

(1) a period of active duty is continuous if it is not interrupted by a break in service of more than 30 days;

(2) *a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded;* and

(3) a period for which the member concerned has received readjustment pay under another provision of law may not be included. (Emphasis added.)

On the authority of Schmid v. United States, 436 F.2d 987, 193 Ct.Cl. 78 (1971), cert. denied, 404 U.S. 951, 92 Sup. Ct. 283, 30 L.Ed. 2d 268 (1971), I conclude that the rounding provision, 10 U.S.C. § 687(a)(2), applies to both eligibility for and the computation of the readjustment pay.

It is ordered that plaintiff have judgment against the defendant in the sum of ten thousand dollars ($10,000.00).

APPENDIX B

Opinion of the United States Court of Appeals for the Ninth Circuit

Dated August 1, 1973

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 72-2633

DONALD C. CASS, *Appellee,*

v.

UNITED STATES OF AMERICA, *Appellant.*

Nos. 72-3028, 72-3029, 72-3030

FRANCIS A. ADAMS, ROBERT J. STENEMAN, MICHAEL W. YOUNGQUIST, *Appellees,*

v.

SECRETARY OF THE NAVY, ET AL., *Appellants.*

[August 1, 1973]

72-2633—Appeal from the United States District Court, District of Montana, Helena Division

72-3028) Appeal from the United States District Court,
72-3029) Central District of California
72-3030)

Before: MERRILL and CHOY, Circuit Judges, and CONTI,* District Judge

CONTI, D.J.:

This case involves the interpretation of 10 U.S.C. 687(a), which permits servicemen to receive readjustment payments upon release from the armed forces. Two issues are

---

* Honorable Samuel Conti, United States District Judge, Northern District of California, sitting by designation.

involved in this appeal: (1) Whether the "rounding provision" of subparagraph (2) of 10 U.S.C. 687(a) applies to reduce the eligibility requirement for readjustment pay; and (2) whether the preliminary injunction issued by the District Court in the Adams-Steneman-Youngquist cases would moot this appeal because they would now qualify under any interpretation of the statute.

These actions were instituted by reserve officers on active duty in the Armed Forces. Each had served more than four and a half years and less than five years. Cass was honorably and involuntarily discharged from the Army. Adams, Steneman and Youngquist, captains in the Marine Corps, were ordered to be involuntarily released from active duty under honorable circumstances, but obtained a preliminary injunction which prevented their release until after they had served more than five years. The preliminary injunction was then dissolved while their cases were still pending. In all the cases the trial courts found in favor of the plaintiffs.

With regard to the substantive issue of whether or not 10 U.S.C. 687(a)(2) was properly interpreted by the district court, it is the opinion of this court that it was not.

The relevant statute provides in pertinent part:

> ". . . a member of a reserve component . . . who is released from active duty involuntarily . . . who has completed, immediately before release, at least five years of continuous active duty, is entitled to a readjustment payment computed by multiplying his years of active service . . . by two months' basic pay of the grade in which he is serving at the time of his release . . . For the purposes of this subsection—
>
> (1) a period of active duty is continuous if it is not interrupted by a break in service of more than 30 days;

(2) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded . . ."

The district courts ruled in favor of plaintiffs, following the rationale of *Schmid* v. *United States,* 436 F.2d 987 (Ct.Cls.) cert. denied 404 U.S. 951 (1971). In *Schmid* the court of claims decided that the rounding provision of 687(a)(2) that "a part of a year that is six months or more is counted as a whole year" applied not only for the purposes of calculating the amount of the readjustment pay owed servicemen eligible for payments, but also in determining whether the five year eligibility requirement was met. Thus, if appellees' position is correct, their time in service (more than four and a half years) was properly rounded off to five years in the district courts and they were thus eligible and entitled to readjustment payments under 10 U.S.C. 687(a). We disagree and reverse.

The concept of readjustment pay was originally made into law in 1956. That Act of July 9, 1956, 70 Stat. 517, 50 U.S.C. 1016(a) (1958 ed.) provided in pertinent part:

"A member of a reserve component who is involuntarily released from active duty after the enactment of this section and after having completed immediately prior to such release at least five years of continuous active duty, except for a break in service of not more than thirty days . . . is entitled to a lump-sum readjustment payment computed on the basis of one-half of one month's basic pay in the grade in which he is serving at the time of release from active duty for each year of active service ending at the close of the eighteenth year. *For the purpose of computing the amount of readjustment payment (1) a part of a year that is six months or more is counted as a whole year* . . ." (Emphasis added)

Thus, that Act clearly provided that the rounding provision applied only to the determination of the amount of payment, and not to the eligibility requirement. In 1962, the statute was codified into its present form.

The present form of the statute does not explicitly limit the rounding provisions to computation of the amount of the benefits. However, the clause of the statute which sets the minimum eligibility at five years, appears to be clear on its face and not subject to the interpretation given it by the court in *Schmid*.

However, even if the statute is arguably ambiguous, the result is unchanged. The rounding provisions conflict with the clear statement that five years is required for eligibility, if the rounding provision applies to eligibilty. The use of the rounding provision would serve no useful purpose in determining eligibility. Eligibility is defined in terms of a fixed duration under the statute. The rounding provision could only be applicable in a situation in which a serviceman had served between four and a half and five years. There is no apparent reason why Congress would choose such a circuitous method to determine eligibility.

An examination of the legislative history behind the 1956 and 1962 versions of the statute supports the interpretation argued by appellant. The senate hearings on the 1956 bill specifically considered and adopted the language which limited the rounding provision to the computation of the amount of the payment. 1956-2 U.S. Code Cong. & Ad. News, pp. 3068, 3070.

In 1962, Congress codified the readjustment payment laws. In the process the language that the rounding provision was limited to the computation of the amount of readjustment pay was deleted. However, the senate report on the new law stated that the bill "is not intended to make any substantive change in the existing law". Senate Report No. 1876, 87th Cong. 2d Sess., 1962 U.S. Code & Ad.

News, p. 2456. It would be inconsistent with the above declaration for this court to construe that Congress intended to broaden the eligibility requirements. Therefore, we reverse on the substantive issue of interpretation of 10 U.S.C. 687(a).

With regard to the arguments of Adams, Steneman and Youngquist that the preliminary injunction issued by the district court in their cases served to make them eligible for readjustment benefits under any interpretation of the statute, we disagree.

The case of *Paul* v. *Seamens*, 468 F.2d 361 (1st Cir. 1972), held that a preliminary injunction designed to preserve the status quo, cannot count toward retirement benefits. In the case at bar, we have decided for appellant, and therefore the injunction in the district court was improperly issued, and cannot be relied upon to support eligibility for readjustment benefits.

The injunction created no additional rights in appellees that they did not have under the statute in question. Any other decision would allow appellants to "bootstrap" themselves into eligibility.

Therefore, the decisions of the district court are reversed.

APPENDIX C

Opinion of the United States Court of Claims

ARTHUR C. SCHMID, JR.

v.

THE UNITED STATES.

No. 493–69

UNITED STATES COURT OF CLAIMS.

JAN. 22, 1971.

[436 F.2d 987]

Proceeding on claim by involuntarily released officer for readjustment pay. On plaintiff's motion and defendant's cross motion for summary judgment, the Court of Claims, Collins, J., held that rounding provision in statute providing for readjustment payment upon involuntary release from active duty applies equally to eligibility requirement and to method of computation, so that officer who was involuntarily released from active duty after having served 4 years, 6 months and 27 days of continuous active duty was entitled to readjustment pay.

Judgment for plaintiff.

Nichols, J., dissented and filed opinion.

Armed Services—13.1(16)

Rounding provision in statute providing for readjustment payment upon involuntary release from active duty applies equally to eligibility requirement and to method of computation, so that officer who was involuntarily released from active duty after having served 4 years, 6 months and 27 days of continuous active duty was entitled to readjustment pay. 10 U.S.C.A. § 687(a)(2).

Arthur B. Hanson, Washington, D. C., attorney of record, for plaintiff.

Arthur A. Birney, Washington, D. C., and John H. Blish, Providence, R. I., of counsel.

Arthur E. Fay, Washington, D. C., with whom was Asst. Atty. Gen. William D. Ruckelshaus, for defendant.

Before Cowen, Chief Judge, and Laramore, Durfee, Davis, Collins, Skelton, and Nichols, Judges.

On Plaintiff's Motion and Defendant's Cross-Motion For Summary Judgment

Collins, Judge.

This case comes to us on the parties' cross-motions for summary judgment. There is no dispute as to the facts.

On June 27, 1969, Arthur C. Schmid, Jr., plaintiff herein, was involuntarily released from active duty as a member of the United States Naval Reserve. On the date of his release plaintiff had attained the rank of lieutenant and was receiving a base pay of $753 per month. He had served 4 years, 6 months, and 27 days of continuous active duty, beginning November 30, 1964. Previously, he had served on active duty from June 30, 1958, to August 30, 1962, a period of 4 years, 1 month, and 30 days. The present claim arises out of the denial by the Department of the Navy of plaintiff's request for readjustment pay pursuant to 10 U.S.C. §687(a), as amended (Supp. III, 1965-67), and it is this statute to which we must now direct our attention.

The statute provides, in relevant part, as follows:

§ 687. Non-Regulars: readjustment payment upon involuntary release from active duty.

(a) Except for members covered by subsection (b), a member of a reserve component or a member of the Army or the Air Force without component who is released from active duty involuntarily, or because he was not accepted for an additional tour of active duty

for which he volunteered after he had completed a tour of active duty, and who has completed, immediately before his release, at least five years of continuous active duty, is entitled to a readjustment payment computed by multiplying his years of active service (other than in time of war or of national emergency declared by Congress after June 28, 1962), but not more than eighteen, by two months' basic pay of the grade in which he is serving at the time of his release. * * * For the purposes of this subsection—

(1) a period of active duty is continuous if it is not interrupted by a break in service of more than 30 days;

(2) *a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded;* and

(3) a period for which the member concerned has received readjustment pay under another provision of law may not be included. [Emphasis supplied.]

It is the Government's position that the statute is ambiguous, but that its legislative history makes it clear that the rounding provision of subsection (2) was intended to apply only to the computation of readjustment pay and not to the 5-year eligibility requirement therefor. That is, the Government argues that the statute, illuminated by its legislative history, requires continuous active duty service of 5 actual years in order to establish eligibility for readjustment pay. Thus, since plaintiff was on continuous active duty for less than 5 actual years during his last period of active duty, he has not established eligibility under the statute and is not entitled to readjustment pay.

Plaintiff argues that the statute is clear on its face—the rounding provision applies equally to the eligibility

requirement and to the method of computation. There is, therefore, no need to refer to legislative history, which, according to plaintiff, is supportive of plaintiff's position or, at least, ambiguous. Because plaintiff served more than 4 years and 6 months of continuous active duty immediately before his discharge, he claims that, for purposes of the eligibility requirement, he has served the required 5 years.

We find that the section is clear and unambiguous on its face and is susceptible, on its face, of only one interpretation. The relevant part of the last sentence of section 687(a) provides that "For the purposes of this subsection * * * (2) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded * * *." Congress imposed no express or implied limitation on the applicability of this rounding provision. The clear indication is that, in determining eligibility for readjustment pay and in computing the amount thereof, a period of 6 months or more is counted as a whole year.

But, although we find no ambiguity in the words of the statute, we are not precluded from examining the legislative history underlying the enactment in order to determine whether there is clear and compelling support for the interpretation urged by the defendant. *See* Lionberger v. United States, 371 F.2d 831, 834, 178 Ct.Cl. 151, 157, cert. denied, 389 U.S. 844, 88 S.Ct. 91, 19 L.Ed. 2d 110 (1967). As the Supreme Court has said, "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" United States v. American Trucking Ass'ns, 310 U.S. 534, 543-544, 60 S.Ct. 1059, 1064, 84 L.Ed. 1345 (1940) (footnotes omitted). After a careful review of the legislative history of section 687(a), we conclude that the support which it lends to defendant's po-

sition is not so clear and compelling as to require us to adopt an interpretation of the section inconsistent with the clear import of its terms.

Section 687(a) was first enacted in 1962[1] and was intended as a revision of the former readjustment pay statute, Act of July 9, 1956, ch. 534, § 265, 70 Stat. 517. The 1956 statute, which was repealed by section 687(a), read, in pertinent part, as follows:

> "SEC. 265. (a) A member of a reserve component who is involuntarily released from active duty after the enactment of this section and after having completed immediately prior to such release at least five years of continuous active duty, except for breaks in service of not more than thirty days, as either an officer, warrant officer, or enlisted person, is entitled to a lump-sum readjustment payment computed on the basis of one-half of one month's basic pay in the grade in which he is serving at the time of release from active duty for each year of active service ending at the close of the eighteenth year. *For the purposes of computing the amount of readjustment payment (1) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded*, and (2) any prior period for which severance pay has been received under any other provision of law shall be excluded. * * *" [Emphasis supplied.]

The language of the repealed statute of 1956, which, it should be pointed out, could easily have been employed in section 687(a), made it perfectly clear that a part of a year that was 6 months or more was to be counted as a whole year only for the purpose of computing readjustment pay.

---

[1] The section was amended in 1966. However, for present purposes, that amendment is irrelevant.

Defendant has stressed that the Senate report accompanying H.R. 10433 (part of which became section 687(a), as passed states:

> This bill, as amended, is not intended to make any substantive change in existing law. Its purpose is to bring up to date title 10 of the United States Code, by incorporating the provisions of a number of public laws that were passed while the bill to enact title 10 into law was still pending in the Congress, and to transfer to title 10, provisions now in other parts of the code.

S.REP.NO.1876, 87th Cong., 2d Sess., 1962-2 U.S. CODE CONG. & AD. NEWS, p. 2456. We think the defendant relies too heavily upon this general statement of purpose, however, especially when the impact of the statement turns on a determination of what is a "substantive change in existing law." Even if the legislative history of section 687 (a) contained no indicia of an intent contrary to that expressed in the quoted statement of purpose, we doubt whether that statement, standing alone, furnishes the clear and compelling evidence of intent which is required before the plain meaning of statutory words can be disturbed.[2]

In any event, we are not faced with having to decide whether the statement of purpose, standing alone, is sufficient to justify disturbing the plain meaning of the statute because there is, in the statute's legislative history, a strong indication that the intent of Congress was in accord with the statute's plain meaning. In enacting section 687 (a), Congress discarded the unambiguous language of the 1956 statute and adopted, instead, language which it had

---

[2] Defendant also points to the fact that the revision notes accompanying Senate Report No. 1876 state that the words " 'For the purposes of' are omitted as surplusage." S.REP. No. 1876, 1962-2 U.S. CODE CONG. & AD. NEWS, p. 2457. This is no argument at all. The omitted words would have been surplusage regardless of the interpretation given section 687(a).

ample reason to believe would make the rounding provision applicable to the eligibility requirement as well as to the computation formula.

The 1956 statute originated as H.R. 9952. As it was passed by the House, the bill read, in pertinent part:

> "SEC. 260. (a) A member of a reserve component who is involuntarily released from active duty after having completed immediately prior to such release at least 5 years of continuous active duty, except for breaks in service of not more than 30 days, as either an officer, warrant officer, or enlisted person, is entitled to a lump-sum readjustment payment computed on the basis of one-half of 1 month's basic pay in the grade in which he is serving at the time of release from active duty for each year of active service ending at the close of the 18th year. *For the purposes of this subsection, a part of a year that is 6 months or more is counted as a whole year, and a part of a year that is less than 6 months is disregarded.* * * *" [Emphasis supplied.]

H.R. 9952, 84th Cong., 2d Sess. (1956). The Senate, however, amended the legislation, adopting several recommendations contained in a letter, dated November 17, 1955, from the Comptroller General to Senator Russell, Chairman of the Committee on Armed Services, commenting on a similar bill. That letter stated in pertinent part:

> Although the language of subsection (a) of the bill seems to indicate that a minimum of 5 years' continuous active duty as an officer or warrant officer is necessary to qualify for a readjustment payment, the last sentence of that subsection appears to reduce the minimum qualifying service to 4 years and 6 months. Presumably the provision authorizing the counting of 6 months or more as a whole year was intended to apply only for the purpose of computing the amount of a lump-sum payment and not the quantum of qualifying

service. If so, the language should be clarified, perhaps somewhat as follows:

> "For the purpose of computing the amount of the readjustment payment a fractional part of a year amounting to 6 months [or 183 days] or more shall be counted as a whole year and a shorter period shall be disregarded."

1956-2 U.S.CODE CONG. & AD. NEWS, pp. 3068, 3070. The restoration in section 687(a) of the language of H.R. 9952, that which the Comptroller viewed as reducing the minimum qualifying service to 4 years and 6 months, is, we think, a strong indication of congressional intent—far stronger than that on which the defendant relies. We do not mean to say that the legislative intent underlying section 687(a) is in accord with the clear meaning of the statutory words, only that the legislative history of that section does not so clearly evidence an intent inconsistent with the plain meaning of the statutory language as to enable us to depart from that plain meaning.

Defendant also argues that the Department of the Navy, one of the agencies charged with the administration of section 687(a), interprets the statute as providing for rounding only for the purpose of computing readjustment pay, and that this administrative interpretation of the statute is entitled to great weight.

There are many instances when the prior administrative interpretation of a statute is entitled to great respect.

> • • • [T]he practical construction given to an act of Congress, fairly susceptible of different constructions, by those charged with the duty of executing it is entitled to great respect and, if acted upon for a number of years, will not be disturbed except for cogent reasons. [Footnote omitted.]

McLaren v. Fleischer, 256 U.S. 477, 481, 41 S.Ct. 577, 578, 65 L.Ed. 1052 (1921). This is, however, but one of many principles bearing on the construction of legislation. It is not the cardinal or dominating rule. In this instance we find that, all things considered, the Navy's course of interpretation is less persuasive than the factors which point to the construction urged by the plaintiff. These other factors, the statutory words and the critical part of the legislative history to which reference has already been made, are sufficient to overcome the administrative construction.

For the foregoing reasons we grant plaintiff's motion for summary judgment and deny defendant's cross-motion for summary judgment. Judgment is entered for plaintiff in the amount of $13,554, computed, according to section 687(a), by multiplying his years of active service (9)[3] by 2 months' basic pay ($1,506). No interest is allowable under 28 U.S.C. § 2516 (1964).

NICHOLS, Judge (dissenting).

I think § 687 is ambiguous by reason of the words "* * * who has completed, immediately before his release, at least five years of continuous active duty * * *." This I read as saying that anything under five years is not enough. It is seemingly contradicted by subsection (2) as Judge Collins quotes it. If two parts of a statute can be read as not contradicting one another, that reading is to be preferred, but such a reading is difficult here. I agree that the legislative history looks both ways and the Navy practice is not of long enough standing to control, nor are we shown what the other Services have done.

Confronted with an ambiguous statute, with legislative history and prior administrative practice unhelpful, and with no prior court decisions cited to us, we must fall back on our intuition for the intent of Congress. It may be de-

[3] This figure is arrived at by totaling and rounding all of plaintiff's active duty service.

batable how finely tuned my intuition is, but for whatever it is worth, I just cannot force myself to believe the Congress intended that anyone having under five years active service should qualify. It might be said, if the Congress meant four years and six months when it wrote five years, it would have been simpler to have written four years and six months. I do not say it because, in all honesty, I know that the Congress sometimes elects the long way around. That approach is too simplistic. We may ask ourselves instead what legislative scheme or plan would envision four years and six months as a qualifying period. How was it selected?

In resolving ambiguity, we must allow ourselves some recognition of the existence of sheer inadvertence in the legislative process. I think that in 1962 they just simply overlooked that in adopting a change of language, there might be some literal-minded persons who would infer a change of meaning. The struggle between the brash re-codifer who wants to "clean up" the language, and is sure he knows how to do so without changing substance, as against the cautious one who clings to obsolete and opaque terminology, for fear of making an inadvertent change, is ancient in the field of legislative draftsmanship. Notorious examples exist in other fields, as for example the standard policy of marine insurance. Conceding that, if I am right, the recodification here was not skillfully done, I think the result gives aid and comfort to the anti-re-codification school of thought and tends to discourage an activity which, in my view, is in the public interest on the whole.

That the change was inadvertent is strongly supported by the reports reproduced in 1962-2 U.S.Code Cong. & Ad. News, at p. 2457. They set forth the statutory sources of § 687, purport to show each change of language, and to explain in each instance the lack of any substantive change. Yet the reduction of the qualifying period from five years to four years six months is nowhere mentioned. I believe that the Congress, had it consciously considered reducing

the qualifying period as alleged, would have held hearings and received reports and testimony. This would have been a matter of importance to the GAO, which commented on the 1956 legislation, as well as to executive agencies, and to veteran's organizations. Apparently nothing of the kind occurred.

I take this occasion to reiterate what I wrote, concurring, in Sarkes Tarzian, Inc. v. United States, 412 F.2d 1203, 1214, 188 Ct.Cl. 766, 787 (1969):

> Defendant forgets that the intent of Congress must be our lodestar, and that any statutory construction necessarily imputes an intent to Congress. If Congress didn't intend it, the statute doesn't do it. • • •

There it was defendant that forgot. Here I fear it is the court.

APPENDIX D

PENDING FEDERAL COURT CASES INVOLVING ENTITLEMENT TO READJUSTMENT PAY UNDER 10 U.S.C. § 687(a).

O'Meara v. United States—Court of Appeals for the Seventh Circuit, Docket No. 73-1802. Class action certified to the Court of Appeals by the District Court for N.D. Ill., Docket No. 72-C-2386.

Bushery v. *United States*—District Court for W.D. Miss., West. Div., Docket No. CA2056-2. Class action.

Sixt v. United States—District Court for S.D. Cal., Docket No. 73-102-E.

Court of Claims cases:	Docket No.
Brown v. United States	393-72
Clough v. United States	147-72
Crooks v. United States	143-73
Dalluge v. United States	136-73
Harris v. United States	327-72
Lafaver v. United States	184-72
Lattimore v. United States	366-72
Murphy v. United States	250-72
Parker v. United States	144-73
Reuter v. United States	241-72
Smythe v. United States	255-72
Wells v. United States	407-72

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-604

DONALD C. CASS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-5661

FRANCIS A. ADAMS, ET AL., PETITIONERS

v.

SECRETARY OF THE NAVY, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

Petitioners in these cases have served more than four and a half years, but less than five years, of active military duty. They were denied readjustment pay when they were involuntarily separated from active service, on the ground that 10 U.S.C. 687(a) authorizes such payments only after five years of service. That Section provides that a member of a reserve component released after "at least five years of continuous active duty" is entitled to a readjustment payment of two months' basic pay for each year of service. It also states that

a partial year over six months is to be counted as a whole year, while a partial year less than six months is to be disregarded. They contend that the statute's rounding provision applies to the length of service requirement, so that, having served more than four years and six months, they must be considered to have served five years, and to be entitled to readjustment pay.

Petitioner in No. 73-604 was released after continuous active duty in the Army Reserve for four years, nine months, and thirteen days; the Army denied his request for readjustment pay of $10,638 (Pet. in No. 73-604 at 3). He commenced this action in the district court for the District of Montana; on June 20, 1972, he was awarded judgment of $10,000 (Pet. App. in No. 73-604 at 3a).[1]

Petitioners in No. 73-5661 were reserve officers in the Marine Corps, who were notified that they would be released from active duty after more than four and a half years but less than five years of continuous service, under orders which specified they were not entitled to readjustment pay. Prior to their release dates, petitioners brought separate actions in the district court for the Central District of California seeking to enjoin their involuntary release and to compel payment to them of readjustment pay.[2] Preliminary injunctions issued, which were dissolved when the petitioners completed five years of service (Pet. App. in No. 73-5661 at 14-

---

[1] To bring the case within the district court's jurisdiction under 28 U.S.C. 1346(a), petitioner waived his claim to readjustment pay in excess of $10,000 (Pet. App. in No. 73-604 at 2a).

[2] It was stipulated that the readjustment pay, if due, would be $9,273 for petitioner Adams and for petitioner Steneman, and $10,065 for petitioner Youngquist.

15).[3] On September 25, 1972, the district court held petitioners were entitled to readjustment pay (Pet. App. in No. 73-5661 at 13-15).

On appeal, the Ninth Circuit reversed both district courts, holding that petitioners are not entitled to readjustment pay, since the rounding provision applies only for the purpose of computing the amount of readjustment pay, not for determining whether the minimum five-year period of service necessary for eligibility has been met (Pet. App. in No. 73-604 at 4a-8a; Pet. App. in No. 73-5661 at 16-19).[4]

As the court of appeals recognized (Pet. App. in No. 73-604 at 6a), its decision conflicts with that of the Court of Claims in *Schmid* v. *United States,* 436 F. 2d 987 (Ct. C.), certiorari denied, 404 U.S. 951. In *Schmid,* the Court of Claims held that a serviceman having active service of more than four and one-half, but less than five years, qualifies for readjustment pay (Pet. App. in No. 73-604 at 9a). As our petition for certiorari in *Schmid* stated (No. 71-361, O.T. 1971, pp. 5-6), under the four and one-half year eligibility requirement announced by the Court of Claims, the government would be subject to an estimated potential liability of more than $12,000,000. Moreover, the controversy over the minimum service requirement for readjustment pay has led to many cases now pending in numerous

---

[3] Both courts below held that petitioners' service for more than five years because of the injunctions did not render them eligible for readjustment pay. No issue relating to these injunctions or their effect on petitioners' rights is raised in the petition.

[4] The decision of the court of appeals is also reported at 483 F. 2d 220.

lower courts (see Pet. App. in No. 73-604 at 20a).[5] For these reasons, this Court should resolve the conflict between the Ninth Circuit and the Court of Claims.

We submit that the decision of the Ninth Circuit is correct; the minimum service requirement for readjustment pay is a full five years. Section 687(a) expressly requires "at least five years of continuous active duty" for eligibility. The ambiguity that arises from the juxtaposition of this portion of Section 687(a) with the rounding provision is dispelled by the history of the readjustment pay provision. As originally enacted in 1956, the statute specified that "at least five years of continuous active duty" were necessary. 70 Stat. 517. Under that statute, as under the present one, the amount of the readjustment pay, as well as entitlement to it, was based upon the number of years of active duty. There was no ambiguity created by the original rounding provision, however, because the 1956 act provided, "*For the purposes of computing the amount of readjustment payment,* (1) a part of a year that is six months or more is counted as a whole year * * *." 70 Stat. 517 (emphasis added). Indeed, the underscored phrase was added at the suggestion of the Comptroller General in order to preclude any possible confusion as to whether a full five years' service was required for eligibility. See S. Rep. No. 2288, 84th Cong., 2d Sess. 11.

---

[5] In addition to the fifteen cases cited by petitioner Cass, at least seven other pending cases involve this issue. *Bell* v. *Secretary of the Navy*, Civ. No. 72-1944 (C.D. Cal.); *Branson* v. *United States*, Civ. No. 73-H-1135 (S.D. Tex.); *Fimiani* v. *Secretary of the Navy*, No. 73-2822 (C.A. 9); *Hudson* v. *Secretary of the Navy*, Civ. No. 72-2860-FW (C.D. Cal.); *Krane* v. *Secretary of the Navy*, Civ. No. 72-2859-FW (C.D. Cwal.); *Owens* v. *Secretary of the Navy*, Civ. No. 73-420-FW (C.D. Cal.); *Reeid* v. *Secretary of the Navy*, Civ. No. 72-1789-FW (C.D. Cal.).

The present language of the rounding provision resulted from a 1962 codification of military statutes. 76 Stat. 506, 507. It is a settled principle of statutory construction that a change in statutory language resulting simply from a codification does not alter the meaning of the statute, even where a literal construction of the new language could result in a substantive change. See, *e.g.*, *United States* v. *Cook*, 384 U.S. 257; *Ohio Bank & Savings Co.* v. *Tri-County National Bank*, 411 F. 2d 801 (C.A. 6). That principle is especially applicable here, inasmuch as both committee reports accompanying the 1962 codification specify that the bill was "not intended to make any substantive change in existing law." S. Rep. No. 1876, 87th Cong., 2d Sess. 6; H. Rep. No. 1401, 87th Cong., 2d Sess. 1.

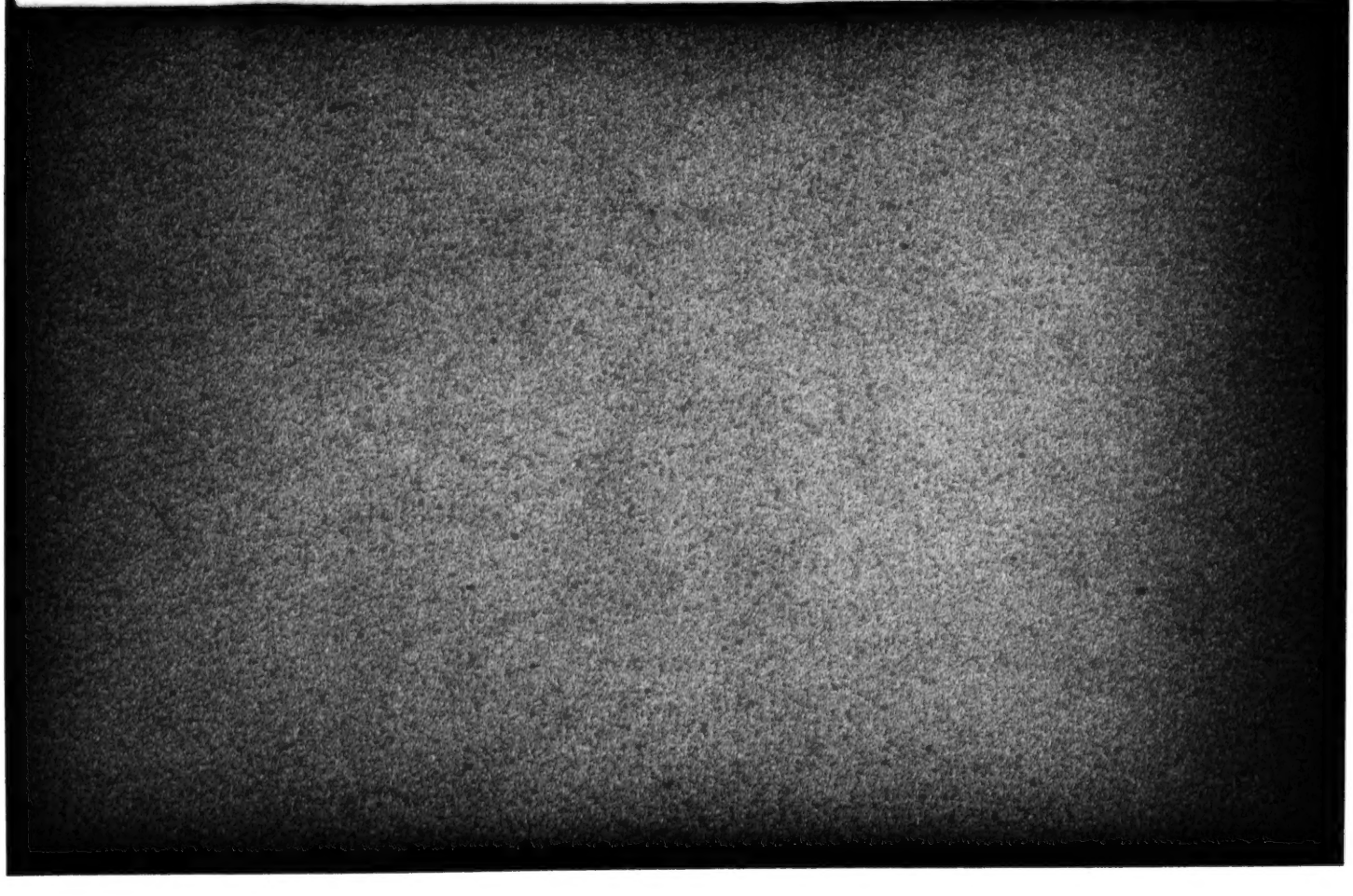
Moreover, the rounding provision serves a functional purpose only with respect to computing the amount of pay. If Congress had intended that four and one-half years of service were sufficient for eligibility, it could simply have so specified rather than adopting a circuitous method for determining eligibility. Finally, under the uniform administrative construction of the present provision, a serviceman is ineligible for readjustment pay unless he has five full years of service. This administrative construction is entitled to deference. *Udall* v. *Tallman*, 380 U.S. 1.

For these reasons, we believe that the decision below is correct. We nevertheless acquiesce in the granting of these petitions for certiorari, so that the conflict with the Court of Claims may be resolved.

It is therefore respectfully submitted that the petitions for writs of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1973.



NO. 73-604, NO. 73-5661

In the

Supreme Court of the United States

OCTOBER TERM, 1973

DONALD C. CASS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

FRANCIS A. ADAMS, ROBERT J. STENEMAN, MICHAEL W. YOUNGQUIST,

Petitioners,

vs.

SECRETARY OF THE NAVY, et al.,

Respondents.

BRIEF OF JOHN N. O'MEARA, AMICUS CURIAE

KEVIN M. FORDE
111 W. Washington Street
Chicago, Illinois 60602

ROGER J. KILEY, JR.
EDWARD T. JOYCE
77 West Washington Street
Chicago, Illinois 60602
Attorneys for Amicus Curiae

The Scheffer Press, Inc.—(312) 263-6850

INDEX

TABLE OF AUTHORITIES

CASES

PAGE

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

NO. 73-604, NO. 73-5661

DONALD C. CASS,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

FRANCIS A. ADAMS, ROBERT J. STENEMAN, MICHAEL W. YOUNGQUIST,
Petitioners,
vs.
SECRETARY OF THE NAVY, et al.,
Respondents.

BRIEF OF JOHN N. O'MEARA, AMICUS CURIAE

INTEREST OF AMICUS

The parties to these consolidated cases have all consented to the submission by John N. O'Meara ("O'Meara") of an amicus curiae brief.[1] O'Meara is plaintiff-appellee

[1] O'Meara has filed with the clerk letters from counsel for all parties expressing their consent.

in a case now pending in the United States Court of Appeals, Seventh Circuit, in which the principal issue is identical to that before the Court in this case. *O'Meara v. United States of America,* (C.A. 7, No. 73-1802).

As a member of the United States Marine Corps Reserve, O'Meara filed a complaint for readjustment pay under 10 U.S.C. § 687(a) against the United States of America ("United States") in the United States District Court, Northern District of Illinois, Eastern Division. He brought that action on his own behalf and, pursuant to Rule 23, Federal Rules of Civil Procedure, as a class action. The United States moved to Dismiss O'Meara's complaint on the ground that O'Meara's four years, eleven months and seventeen days of active duty did not satisfy the "five year" eligibility requirement of 10 U.S.C. §687 (a). The District Court denied that motion and in its memorandum opinion ruled that the definition of year in subsection (a) ". . . a part of a year that is six months or more is counted as a whole year . . .", by its terms is applicable to O'Meara's fractional year service making his total active duty five years and that he thus satisfied the five year eligibility requirement.

O'Meara then moved the District Court for an order that the cause be designated and maintained as a class action pursuant to Rule 23, Federal Rules of Civil Procedure. The Court granted O'Meara's motion.

The United States took an appeal to the United States Court of Appeals, Seventh Circuit, from these two interlocutory orders which the District Court had certified pursuant to 28 U.S.C. §1292(b). The principle issue before the Court of Appeals is precisely the same issue as that before the Court in this case, viz., the applicability of the definition of "year" in 10 U.S.C. §687(a).

Both parties have filed their respective briefs with the Clerk of the Court of Appeals, Ninth Circuit, but the Court is holding oral argument in abeyance pending decision of the Supreme Court in this case.

O'Meara is anxious to contribute to full consideration of the case before the Court and submits his brief to aid the Court in resolving the issue before it.

SUMMARY OF ARGUMENT

This case involves exclusively the interpretation of 10 U.S.C. §687(a). Specifically, the question is whether the definition of "year" appearing in subsection (a) applies to the subsection for all purposes where the word "year" appears or applies to the subsection for one purpose only, to compute the amount of statutory benefits. The definition in subsection (a) reads that ". . . a part of a year that is six months or more is counted as a whole year. . . ". It is immediately preceded by the exegetical phrase, "For the purposes of this subsection". The word "year" appears in subsection (a) both in the eligibility statement and in the formula for computing benefits.

This Court is asked to determine whether the Court of Appeals, Ninth Circuit, was correct when it found that the definition of year applied to subsection (a) for only one purpose, to determine amounts of benefits, not to determine eligibility, and that, therefore, petitioner's four years, nine months and thirteen days of active duty did not satisfy the five year eligibility requirement.

In the view of the Amicus, the judgment of the Court below was incorrect. Eleven federal courts at various levels have considered the precise issue before the Court. All but one, the Court below, have held that the defini-

tion of "year" contained in subsection (a) of Section 687 applies to the subsection for all purposes and without limitation.

The Amicus contends first, that subsection (a) of Section 687 is clear and unambiguous, and is susceptible of only one interpretation, that its definition of year as any part of a year "six months or more" is applicable to determine eligibility under subsection (a). The definition in subsection (a) by its clear terms applies to the subsection without limitation for the phrase which precedes it states that definition applies "For the purposes of this subsection".

The respondent, however, contends that the subsection's eligibility requirement of "five years . . . active duty" is clear and that nothing short of five full years satisfies the statute's eligibility requirement. This contention wholly ignores and reads out of subsection (a) the clear definition of year as any part of a year "six months or more" and the exegitical phrase that the definition applies "For the purposes of the subsection."

The respondent also and alternatively contends that there is ambiguity in subsection (a), that resort to legislative history is therefore appropriate and that legislative history is clear that the definition of "year" does not apply to determine eligibility.

The purported ambiguity upon which the respondent exclusively relies to justify resort to legislative history does not exist. The conflict creating the ambiguity purportedly lies in the conflict between the statement of eligibility, five years active duty, and the definition of "year" being any part of year "six months or more". Applying the definition to the eligibility statement, what is

expressed to be five years becomes four years-six months. That is a conflict, contends the respondent, because it is circuitous and without apparent reason.

Amicus contends that subsection (a) is clear of ambiguity and that any assertion that Congress may have been circuitous without apparent reason, albeit clear, wholly fails to justify resort to legislative history. The use of the word "year" as statutorily defined in the eligibility statement is consistent with the fundamental purpose of the subsection which is to provide benefits to reservists who volunteer for continued active duty but are denied that opportunity.

Respondent actually finds ambiguity, not in the language of 10 U.S.C. §687(a) but in its legislative history. Amicus contends that subsection (a) being free of ambiguity, must be read as it is written and that legislative history cannot be used to create an ambiguity which does not appear on the statute's face.

Respondent first points to the precessor to subsection (a) which clearly limited the definition of "year" to computation of benefits, "For the purposes of computing the amount of readjustment pay . . ." and asserts that the substitution in the present subsection of the words "For the purposes of this subsection" really was not intended by Congress to change the meaning expressed in the repealed subsection. Respondent finds evidence of this intent not on the face of the statute but in a Senate report which expressed generally that the new bill was not intended to make any substantive change.

Amicus contends that if a statute's clear terms change the substance of its predecessor, even if inadvertent, the clear terms must prevail.

The Respondent contends that the subsection was changed as the result of a codification and that therefore even if it clearly made a change in substance, it must be read as though no change was made. Amicus contends no such principle of law exists and that if a statute's terms are free of ambiguity, they must be followed without resort to legislative history.

Amicus finally contends, but for argument purposes only, that even if an ambiguity in the statute exists, the legislative history does not solve it. The difference between subsection (a) as it is now written and as it was written previously clearly indicates an intention to effectuate the application of the definition of year to subsection without limitation. The Senate report's generalized statement that no change in substance was intended is not sufficient to overcome the clear intent manifested in the comparison between the language of the old and the present statute. This is especially so in light of the "fact" that the old bill originally read precisely as the statute now reads but was changed because of the expressed fear of the Comptroller General that it could be construed as requiring only four years six months for eligibility.

The decision of the Court below should be reversed and the decisions of the District Courts affirmed because of the manifestly clear language of the statute in question. The Respondent perceives the language change to be inadvertent and engages in legal alchemy to find justification for its resort to legislative history, which at best creates rather than solves an ambiguity. The application of the definition of "year" without limitation to subsection (a) is clear and must prevail.

ARGUMENT

I. THE COURT OF APPEALS FOR THE NINTH CIRCUIT ERRED IN ITS INTERPRETATION OF 10 U.S.C. §687(a); THEREFORE, ITS DECISION MUST BE REVERSED AND THE DECISIONS OF THE DISTRICT COURTS AFFIRMED.

A. Cass' Four Years, Nine Months And Thirteen Days Of Active Duty In The United States Army Qualifies Him For Benefits Under 10 U.S.C. §687(a).

This appeal from the United States Court of Appeals, Ninth Circuit raises only one fundamental issue, whether Cass' four years, nine months and thirteen days satisfies the five year eligibility requirement of 10 U.S.C. §687 (a).

In pertinent part subsection (a) provides:

> ". . . a member of a reserve component . . . who . . . was not accepted for an additional tour of active duty . . . and who, immediately prior to his release, has completed, at least five years of continuous active duty, is entitled to a readjustment payment computed by multiplying his years of active service . . . by two months' basic pay . . . For the purposes of this subsection—
>
> • • •
>
> . . . a part of a year that is six months or more is counted as a whole year, and a part of a year less than six months is disregarded."

The Court of Appeals, Ninth Circuit, held that the definition of "year" just quoted, which reads ". . . (f)or purposes of this subsection . . . a part of a year that is six months or more is counted as a whole year . . .", applies to subsection (a) for only one purpose, to compute the actual amount of readjustment benefits, not for

the purpose of determining eligibility, and that Cass thus failed to qualify for the statutory benefits. *Cass* v. *United States,* 483 F.2d 220 (1973).

The decision of the Court of Appeals in *Cass* conflicts with the decisions of every other court which has considered the issue. The first court to consider the question was the Court of Claims in *Schmid* v. *United States,* 436 F. 2d 987 (Ct. Cls., 1971), *cert. denied* 404 U.S. 951 (1971). The Court ruled that subsection (a) of Section 687 ". . . is clear and unambiguous on its face and is subsceptible, on its face, of only one interpretation . . .", that the phrase "(f) for the purposes of this subsection . . ." compels application of the definition of year, "a part of a year that is six months or more", to subsection (a) for all purposes, including to determine eligibility. 436 F. 2d at 989. Applying the definition of year for eligibility purposes, the Court counted Schmid's four years, six months and twenty-seven days of active duty as five years and ruled that he satisfied the subsection's five year eligibility requirement. 436 F.2d at 991.

The United States, in *Schmid,* unsuccessfully argued that the legislative history of subsection (a) of Section 687 clearly establishes that nothing short of five full years of active duty is required as a condition of eligibility and that despite the introductory phrase ". . . [f]or the purposes of this subsection. . .", the definition of year is applicable to the subsection, not to determine eligibility, but for only one purpose, to compute the amount of benefits. The United States argued that, although Congress admittedly discarded the plain language of the predecessor to subsection (a)[2] which clearly

[2] The Act of July 9, 1956, ch. 534, §265, 70 Stat. 517.

limited the application of the definition of year to the subsection for one purpose, "[f]or the purposes of computing the amount of readjustment payment. . .", and substituted in its place the language of the present subsection (a) which has no such limitation, "[f]or the purposes of this subsection. . .", Congress really did not intend to do what it did, i.e., change the language of subsection (a). Congress, the United States contended, really intended the definition of year to be applicable only "for purposes of computing the readjustment payment" even though the subsection reads "[f]or the purposes of this subsection". The United States referred the Court to the Senate report which accompanied the bill which became 10 U.S.C. §687. The report expressed that "this bill . . . is not intended to make any substantive change in existing law. . .".

The Court, in *Schmid,* rejected the United States arguments because it found no ambiguity whatever in the language of subsection (a). The Court found that the subsection clearly defines the term year as ". . . a part of a year that is six months or more. . .", that on its face, that definition is plainly without limitation in its application to subsection (a), and that it therefore clearly applies to the subsection to count the years for purposes of determining eligibility for readjustment benefits.

Moreover, the Court determined that the legislative history indicated that the intent of Congress was in accord with the subsection's plain meaning, or that at most, the legislative history was not so clear and compelling as to require an interpretation inconsistent with the subsection's clear terms. First, the Court pointed to the admitted change in the language between subsection (a) and its predecessor, (i.e., the discarding of the clear

limitation in the application of the definition of year to the subsection for only one purpose, and the substituting of equally clear language making the definition apply to the subsection without limitation). And this clear and obvious change in the language, the Court ruled, cannot be set aside because of a general statement of purpose appearing in a Senate report. 436 F.2d at 990.

The next Court to consider the precise issue on appeal here was the District Court in *Cass* v. *United States*, 344 F. Supp. 550 (1973). There, the District Court of Montana, Helena Division decided, as in *Schmid*, that the language of subsection (a), ". . . (f)or the purposes of this subsection . . . a part of a year that is six months or more is counted as a whole year. . ." clearly and unambiguously applies to subsection (a) for the purpose of determining eligibility, and that Cass' four years, nine months and thirteen days of active duty counts as five years to satisfy the subsection's five year eligibility requirement. 344 F. Supp. at 551. This decision was reversed by the Court of Appeals, Ninth Circuit in *Cass* and that decision is now before the Court.

The United States District Court, Central District of California, in three unpublished decisions, also decided the same issue precisely as did the Court of Claims in *Schmid* and the District Court in *Cass*, and counted parts of a year "six months or more" as a whole year to determine that the subsection's five year eligibility requirement had been met. *Adams* v. *Secretary of the Navy*, (C.A. 9, No. 73-3028); *Steneman* v. *United States*, (C.A. 9, No. 73-3029); *Youngquist* v. *United States* (C.A. 9, No. 73-3030).[3]

---

[3] O'Meara is unable to locate the District Court numbers; the numbers here cited are the numbers of the United States Court of Appeals, Ninth Circuit.

These District Court decisions, having been consolidated on appeal with *Cass*, were reversed by the decision of the United States Court of Appeals, Ninth Circuit now before this Court.

The United States District Court, Northern District of Illinois, Eastern Division, next considered the issue, deciding that the definition of "year" in subsection (a) applied to the subsection for all purposes including to determine eligibility under 10 U.S.C. §687(a) and ruling that O'Meara's four years, eleven months and seventeen days satisfied the subsection's five year eligibility requirement. *O'Meara* v. *United States*, 59 F.R.D. 560 (D.C. N.D. Ill., (1973)). This decision has been and is pending before the United States Court of Appeals, Seventh Circuit (C.A. 7, No. 73-1802).[4]

The Court of Claims in *Campbell* v. *United States*, 200 Ct. Cl. 742 (1973) and the District Court, Central District, California, in *Krane* v. *Secretary of the Navy* (C.D. Cal., Civil No. 72-2859FW), *Reid* v. *Secretary of the Navy* (C.D Cal., Civil No. 72-1789FW), and *Fimani* v. *Secretary of the Navy* (C.D. Cal., Civil No. 72-2201-LTL) have all likewise held that the definition of "year" in subsection (a) applies to the subsection both for the purpose of determining eligibility as well as for the purpose of computing the amount of benefits.

The question before this Court therefore is clear. Does the definition of "year" in subsection (a), ". . . a part of a year six months or more is counted as a whole year . . .", which by its terms applies ". . . (f)or the purposes of this subsection . . ." apply to subsection (a) for the purposes both of determining eligibility as well as the

[4] The Court has held oral argument in abeyance pending decision of this Court in *Cass*.

amount of statutory benefits. Or does it apply to the subsection for only one purpose, to determine the amount of the benefits. O'Meara submits that the definition of "year" applies to subsection (a) for all purposes including eligibility and that therefore the decision of the Court of Appeals in *Cass* must be reversed and the District Courts affirmed.

1. The Language Of Subsection (a) Of Section 687 Is Clear And Unambiguous.

The language of subsection (a) is clear and unambiguous. On its face, it is susceptible of only one interpretation, that the definition of "year" in subsection (a) applies to the subsection without limitation and that therefore it applies for purposes of determining eligibility. It is the duty of this Court, therefore, to enforce the subsection as it is clearly written and to reverse the decision of the Court of Appeals in *Cass. Caminetti* v. *United States,* 242 U.S. 470, 490 (1917); *United States* v. *Standard Brewery,* 251 U.S. 210, 219 (1920); *United States* v. *Schreveport Grain & Elevator Co.,* 287 U.S. 77 (1932); *Helvering* v. *City Bank Company,* 296 U.S. 85 (1935); *Sixty Two Cases, etc.* v. *United States,* 340 U.S. 593 (1951); *Durkee Famous Foods* v. *Harrison,* 136 F. 2d 303 (7th Cir. 1943); *De Soto Securities Company* v. *Commissioner of Internal Revenue,* 235 F. 2d 409 (7th Cir. 1956); *Wirtz* v. *Local 191, Int'l. Brotherhood of Teamsters, et al.,* 321 F. 2d 445 (2nd Cir. 1963); *General Electric Company* v. *Southern Construction Co.,* 383 F. 2d 135 (5th Cir. 1967), *cert. denied* 390 U.S. 955 (1967); *Arkansas Valley Industries, Inc.* v. *Freeman,* 415 F. 2d 713 (8th Cir. 1969).

In pertinent part, subsection (a) of Section 687[3] provides:

> "(a) [A] member of a reserve component or a member of the Army or the Air Force without component who is released from active duty involuntarily, or because he was not accepted for an additional tour of active duty for which he volunteered after he had completed a tour of active duty, and who has completed, immediately prior to his release, at least five years of continuous active duty, is entitled to a readjustment payment computed by multiplying his years of active service (other than in time of war or national emergency . . .), but not more than eighteen, by two months' basic pay of the grade in which he is serving at the time of his release. . . . For the purposes of this subsection—
>
> (1) a period of active duty is continuous if it is not interrupted by a break in service of more than 30 days;
>
> (2) a part of year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded; and . . ."

Subsection (a) clearly defines the word "year" to mean any ". . . . part of a year that is six months or more . . .". And that definition is clearly applicable to subsection (a) without limitation wherever the word year appears, for by its terms, the definition applies ". . . [f]or the purposes of this subsection . . .".

The word "year" appears twice in subsection (a), in the statement of years of active duty required for eligibility, ". . . . at least five *years* . . .", and in the formula for computing the amount of readjustment benefits,

---

[3] O'Meara has attached the full text of §687(a) as an Addendum to his Brief.

". . . multiplying his *years* of active service . . . by two months' basic pay . . .". Because the definition of year, by its terms, clearly applies without limitation to subsection (a). ". . . a part of a year that is six months or more is counted as a whole year. . ." both for the purpose of determining whether the five year active duty eligibility requirement has been met and for the purpose of computing the amount of readjustment benefit. Consequently, the clear and unambiguous language of subsection (a) mandates that *Cass'* four years, nine months and thirteen days of active duty be counted as five years for both purposes thereby satisfying subsection (a)'s five year active duty eligibility requirement.

The United States has admitted in these cases that the language of subsection (a) is clear and unambiguous, but argues that it clearly and unambiguously requires as a condition of eligibility, nothing short of five full years of active duty. Quoting the subsection's eligibility statement of ". . . at least five years of continuous active duty. . .", and relying on the decision of the Court of Appeals in *Cass,* the United States contends that the eligibility period is unequivocal and not modified by any other clauses in the subsection.

O'Meara submits that this argument of the United States must be rejected by the Court. While purporting to say that the subsection is clear on its face, the United States in actuality is urging the Court to read out of subsection (a) the statutory definition of year. While O'Meara agrees with the United States that subsection (a) requires five years of active duty as a condition of eligibility, he does not agree that the word "year" as used in the eligibility statement is undefined in subsection (a). For to contend, as the United States does, that the use of the word "year"

in the statement of eligibility is not modified by any other clause in the subsection, is to ignore not only the clear statutory definition, ". . . a part of a year that is six months or more is counted as a whole year. . .", but also its unambiguous exegetical statement that the definition applies ". . . [f]or the purposes of this subsection. . .". It is this statutory definition of "year", and no other, which must be used by the Court in reading subsection (a). *Thorton* v. *Commissioner of Internal Revenue,* 159 F.2d 578 (7th Cir. 1947). And reading this statutory definition into the subsection's eligibility requirement of ". . . at least five years of continuous active duty. . .", subsection (a) is clear on its face, and on its face is susceptible of only one interpretation, that *Cass'* four years, nine months and thirteen days of active duty is counted as five years and satisfies the eligibility requirement of subsection (a).

But the United States contends, and it is the United States' essential contention in this appeal, that the statutory definition of "year" does not apply to the subsection wherever the work "year" appears. Rather, the United States contends that, despite the definition's introductory phrase, ". . . [f]or the purposes of this subsection. . .", the definition applies to the subsection for only the one purpose, to the use of the word "year" in the formula for computing the amount of benefits, not to its use in the eligibility statement. Although the United States proposes to argue that its contention is supported by the clear terms of subsection (a), the United States is less than serious in advancing that argument. Actually, the United States relies almost exclusively upon selected portions of legislative history rather than on the terms of subsection (a) for support of its contention.

Realizing it must find an ambiguity in the statute before it can make its case with legislative history, the United States will move quickly in its argument from the less than serious contention that the eligibility statement is clear and not modified by any other clause in the subsection, to the contention that the subsection's statement of eligibility conflicts with the subsection's definition of year. It is in this conflict and this conflict alone, that the United States, relying again upon the Court of Appeals in *Cass*, will purport to find the necessary ambiguity as a predicate to its resort to legislative history.

The purported conflict in subsection (a) upon which the United States will rely to justify its almost exclusive resort to legislative history for support of its contention, is really no conflict at all. The statement of eligibility, ". . . at least five years. . .", does not, on its face, conflict with the statutory definition of year ". . . a part of a year that is six months or more". Rather, the statutory definition is read into the word "year" as it is used in the eligibility statement.

The United States relies on the decision of the Court of Appeals in *Cass* to find a "conflict" in the terms of subsection (a). But although the Court in *Cass* used the word "conflict", it was referring to circuity of terms, not conflict, that the subsection, when read as Congress plainly wrote it, is circuitous. The court commented that there is no apparent reason why Congress would choose such a circuitous method of setting the eligibility period. It is from this purported absence of "apparent reasons" for the use of clear, *albiet*, circuitous draftsmanship, that the United States will purport to find the ambiguity which is so vital to its almost exclusive reliance on legislative history to support its contention that Congress did not mean to write what it actually wrote.

O'Meara submits that subsection (a) is free of ambiguity and that any assertion that Congress may have been circuitous without apparent reason when it wrote this clear subsection wholly fails to justify resort to legislative history to create an ambiguity which otherwise does not exist in order to rewrite the statute. The statutory definition of year is clear and its application to the entire subsection, including the eligibility statement, is clear. The use of that word in the eligibility statement as statutorily defined is consistent with the fundamental purpose of the subsection which is to provide a benefit to reservists, like Cass, Adams and O'Meara, who serve on active duty and who subsequently are denied extensions of active duty. In no way does the use of the statutory definition destroy or hinder that purpose. Thus, even though the United States, or the Court, believes the clear terms of the statute to be circuitous, the Court must not superimpose a preferred drafting style and conclude that since Congress did not use the preferred style, it did not mean what it has clearly written. Being free of ambiguity, the clear terms of subsection (a) must prevail. Resort to legislative history under these circumstances must be scrupulously avoided.

2. The Definition Of "Year" In Other Sections Of Title 10, United States Code, Supports The Contention That Subsection (a) Of Section 687 Of Title 10 Is Free Of Ambiguity.

The United States doubtless will refer the Court to other sections of Title 10, United States Code, as supporting its contention that Congress, in writing subsection (a) of Section 687 did not intend to say what is there clearly said. It will be the contention of the United States that the various other sections of Title 10 cited by it contain definitions of "year" which are clearly limited in their ap-

plication to the computation of benefits, not to eligibility, and that the language of those sections evidences the intent of Congress in subsection (a) to limit the statutory definition of year, even though the subsection contains no such limitation.

Putting aside for argument purposes only the principle that the same word used in different sections of the same chapter may have two or more distinct meanings, *Wood, et al.* v. *Dennis,* (C.A. 7, 72-1182), O'Meara submits that these other sections always cited by the United States support his, not the State's position. The Sections which contain definitions of "year" and which are generally referred to by the United States as supporting its position are as follows: 10 U.S.C. 1167 (regular warrant officer severance pay); 10 U.S.C. 1405 (retired pay); 10 U.S.C. 3303, 3786, and 3796 (Army severance pay); 10 U.S.C. 6151, 6328, and 6404 (Navy and Marine Corps retired pay); 10 U.S.C. 8303, 8786, and 8796 (Air Force severance pay); 14 U.S.C. 286 (Coast Guard severance pay); 42 U.S.C. 212 (Public Health Service retired pay); 10 U.S.C. 6330 (transfers to Fleet Reserve). This list contains one Section, 10 U.S.C. §6330, which even the United States admits contains a definition of year which applies both to eligibility as well as to computation of benefits. Apparently it is the United States' contention that because thirteen sections are written one way, and only one is written the other way, that subsection (a) must have been intended by Congress to be read the way most, but not all are written.

This argument defeats itself. The existence of the one section in which the definition of "year" admittedly is read into that section's eligibility statement, totally refutes any contention that the other sections support the interpretation of subsection (a) advanced by the United States here.

If these section have any value, it is only for the proposition asserted by petitioners, not by the United States. 10 U.S.C. §6330, is almost identical to subsection (a) of Section 687. It is a statute which allows a member of the Navy Reserve, assuming he has the requisite years of active duty, to transfer to the Fleet Marine Corps Reserve, and which confers money benefits upon such a transfer. In order to be eligible subsection (b) requires that he have completed ". . .20 or more years of active service. . .". If he meets this eligibility requirement, his benefits, in subsection (c) are computed by multiplying ". . . 2½ percent of the basic pay . . . by the number of years of active service. . .". The word "year", used in both subsection (b) and subsection (c) is defined in subsection (d) as ". . . a part of a year that is six months or more is counted as a whole year. . .". And that definition is prefaced by the phrase, ". . . For the purposes of subsection (b) and (c), . . .".

Subsection (d) of Section 6330 thus contains a definition of year which is identical to that before this Court. Yet, the United States admits the clear applicability of that definition to the eligibility statement in Section 6330, but denies it in the section before this Court. The language is the same, the argument of circuity applies with identical force to both Sections, yet the United States admits Section 6330 is clear and asserts that Section 687 is ambiguous.[6]

---

[6] The list of other sections are distinguishable from the subsection before the Court and from Section 6330. In the other sections, the definition of year obviously does not apply to the eligibility statements because in those sections eligibility is not expressed in terms of years, but rather in terms of events such as denial of promotions.

3. Legislative History Cannot Be Used To Create An Ambiguity In The Clear Language Of Subsection (a).

For all practical purposes the United States relies exclusively upon legislative history to support its contention that the subsection's definition of "year", which by its terms applies without limitation ". . . [f]or the purposes of this subsection. . .", really applies to the subsection for only one purpose. O'Meara submits that the subsection being free of ambiguity must be read as it is written, and that legislative history cannot be used to create an ambiguity or to establish that Congress made a mistake which the Court should now correct. *United States* v. *Schreveport Grain & Elevator Company*, 287 U.S. 77 (1932); *Helvering* v. *City Bank Company*, 296 U.S. 85 (1935); *Aceto Chemical Co.* v. *United States*, 465 F.2d 908 (CCPA 1972); *Arkansas Valley Industries, Inc.* v. *Freeman*, 415 F.2d 713 (1969); *General Electric Co.* v. *Southern Construction Co.*, 383 F.2d 135 (1967); *Durkee Famous Foods* v. *Harrison*, 136 F.2d 303 (1943); and *United States* v. *Zions Savings & Loan*, 313 F.2d 331 (10th Cir. 1963).

The reliance of the United States upon legislative history consists of essentially three arguments. It compares subsection (a) to its predecessors; it analyzes the Senate report accompanying the bill which became subsection (a); and it establishes that the various branches of the armed forces administratively interpret the subsection just as the United States does. A brief analysis of each of these, arguments discloses the essence of the United States' case, that Congress made a mistake when it enacted subsection (a). Although the statute on its face does not disclose any mistake or ambiguity, the United States pur-

ports to find it in the subsection's legislative history. The United States thus attempts to use legislative history to create not to solve ambiguity, and seeks to pursuade the Court to rewrite the statute to correct this purported mistake.

Comparing subsection (a) to its predecessor, the United States points out that in both cases the subsection's statement of eligibility and the definition of "years" are identical, ". . . at least five years of continuous active duty . . ." and ". . . a part of a year that is six months or more is counted as a whole year . . .". However, the United States points out, that the introductory phrase to the subsection's definition of year is plainly different. In the repealed subsection, the phrase read ". . . [f]or the purposes of *computing the amount of readjustment pay. . .*" (emphasis supplied), while in the present subsection it reads ". . . [f]or the purposes of this subsection. . ." . It is this change, which removed language limiting the applicability of the definition of "year" to the subsection for only one purpose and substituted in its place language making the definition applicable to the subsection without limitation, that the United States argues, was unintended.

It was unintended, the United States argues, because the Senate report accompanying the bill which became the present subsection (a) states that no "substantive change" was intended, that the bill's purpose was merely to update and codify Title 10. Furthermore, the United States points out, this Senate report makes no mention of this change in the language, even though the report purports to list the changes to prior laws made by subsection (a).

Finally, the United States represents that all of the branches of the armed services administratively interpret

the definition of "year" in subsection (a) as applying with the limitation expresseed in the repealed subsection, i.e., not to the subsection without limitation whenever the word "year" appears, but rather for only the one purpose of computing the amount of readjustment benefits.

The combined effect of these historical "facts", the United States argues, clearly establishes that Congress did not intend to do what it clearly did in subsection (a), that it did not intend the change it made. And on that basis, the United States, in effect, is asking the Court to excise the introductory phrase of the subsection's definition of "year", ". . . [f]or the purposes of this subsection. . ." and to read into its place, the phrase ". . . [f]or the purposes of computing the amount of readjustment payment. . .".

O'Meara submits that legislative history cannot be used to create, rather than solve, an ambiguity, and that, therefore, the Court must read subsection (a) as it is plainly written, not utilize legislative history to rewrite the subsection's otherwise clear language.

This Court, in *Helvering* v. *City Bank Company*, 296 U.S. 85 (1935), rejected an argument very similar to that made by the United States here. That case involved the construction of Section 302(d) of the Revenue Act of 1926. The question was whether the corpus of a trust was includible in decedent's gross estate for tax purposes. The resolution of the issue depended upon whether the trust reserved the power to revoke, alter or amend the trust. Section 302(d) of the Revenue Act by its clear terms included in gross income the corpus of any trust which reserved such a power to be exercised by the decedent "with any person".

The decedent had reserved such a power in the trust in question. He argued however, that Section 302(d) should be read, not as it was clearly written, but as Section 219(g) of the same title was written. In that section, if the reserved power was to be exercised with one not a beneficiary, then it is not to be included in gross income. Since the decedent's trust reserved a power to be exercised by one who was not a beneficiary under the trust, his representative argued that the corpus should not be included in gross income.

Decedent's representative resorted to legislative history to support his contention that Section 302(d) should be read, not as it was plainly written, but as another section was written. The Report of the Ways and Means Committee on Section 302 (d) stated that "This provision is in accord with the principle of Section 219(g) of the bill which taxes to the Grantor the income of a revocable trust." Refusing to resort to legislative history, this Court stated in pertinent part:

> "The two sections have a cognate purpose but they exhibit a marked difference of substance. The one speaks of a power to be exercised with one not a beneficiary; the other of a power to be exercised with any person. . . It is true the Report of the Ways and Means Committee on Section 302(d) said "this provision is in accord with the principle of Section 219(g) . . .'. But to credit the assertion that the difference in phraseology is without significance and in both sections Congress meant to express the same thought, would be to disregard the clear intent of the phrase 'any person' used in §302(d). We are not at liberty to construe language so plain, as to need no construction, or to refer to Committee reports where there can be no doubt of the words used." 296 U.S. at 89.

The principle expressed in *Helvering* is particularly applicable to reject the argument made here by the United States. In the face of the clear terms of subsection (a) ". . . [f]or the purposes of the subsection . . . a part of a year that is six months is counted as a whole year. . .", the United States urges upon this Court the language of the repealed statute which reads ". . . [f]or the purposes of computing the amount of readjustment payment. . .". And for support for this contention, the United States refers the Court to legislative history, a generalized statement in the Senate report that the bill was not intended to make any changes in substance in the repealed statute.

O'Meara submits that to credit the clear difference in language between the present subsection (a) and the repealed statute as having no substance, is to disregard the phrase ". . . [f]or the purposes of this subsection. . .". *Helvering;* accord., *U.S.* v. *Shreveport Grain & Elevator Co.,* 287 U.S. 77 (1932); *Aceto Chemical Co., Inc.* v. *United States,* 465 F.2d 908 (C.C.P.A., 1972).

The United States Court of Appeals for the Seventh Circuit, in *Durkee Famous Foods* v. *Harrison,* 136 F.2d 303 (7th Cir., 1943), rejected an argument similar to that here made by the United States. In *Durkee,* the United States sought to uphold the imposition of a tax under the Internal Revenue Code by claiming that the words "first domestic processing" really meant "the first domestic processing following the enactment of this act." And in support of its contention, the United States referred the Court to the administrative interpretation of the act in question by the Internal Revenue Service, which was in accord with the meaning urged upon the Court by the United States.

In refusing to adopt the United States' argument the court stated:

> "We think here there is no room for legitimate argument but that a literal reading of the language employed by Congress supports plaintiff's position. It is difficult to conceive of plainer language than the 'first domestic processing'. According to the government first means second or third or fourth. If Congress intended first after the effective date of this act, it could have easily so stated. Not only did if fail to do this, but it later in the same section defined the term 'first domestic processing' as meaning the 'first use in the United States'. Certainly the 'first use' took place with the 'first processing', which in the instant case was prior to the effective date of the act." 136 F.2d at 307.

Just as "first domestic processing", clearly defined in the statute in *Durkee* as the "first use in the United States", prevailed over efforts of the United States to rewrite the statute using legislative history, so also the word "year" in the eligibility statement of subsection (a), clearly defined as ". . . a part of a year that is six months or more. . .", must prevail here against the United States' effort to rewrite the subsection using legislative history. *Durkee;* accord., *United States* v. *Zions Savings & Loan Association,* 313 F.2d 331 (10th Cir., 1963).

The United States is of the view that Congress made a mistake in enacting subsection (a) because it inadvertently removed the limitation on the applicability of the definition of year, which was clearly apparent in the repealed subsection, ". . . [f]or the purposes of computing the amount of readjustment payment. . .", and substituted in its place, a definition without limitation ". . . [f]or the purposes of this subsection. . .". It purports to find

that mistake not on the face of the statute, but in its legislative history and, on that basis, wants this Court to rewrite the statue to correct it. This the Court must not do.

The United States Court of Appeals for the Eighth Circuit, in *Arkansas Valley Industries* v. *Freeman,* 415 F.2d 713 (8th Cir., 1969), also rejected a similar effort by the United States to resort to legislative history to find a mistake in otherwise clear language and to rewrite the language of a statute to correct it. In *Arkansas Valley,* the United States sought to have included in a statutory definition of "packer", the works "live poultry dealers or hand dealers" in the face of a precise statutory definition which left those words out. The Court quoted from the Agriculture Secretary's judicial officer's opinion which the Court was called upon to review:

> ". . . 'With the prohibitions of Section 202 applicable to live poultry dealers or handlers who are not licensees under Title 5, we cannot believe that Congress intended to make prohibited conduct on the part of live poultry dealers or handlers unlawful without providing a sanction therefor. The failure to specifically amend sections 203 and 204 to include live poultry dealers or handlers appears then as due to oversight or inadvertence.
>
> Under the circumstances then, it is permissible to read into sections 203 and 204 "live poultry handler or dealer". Courts will not hesitate to turn into the sense of some section or provision a qualifying or expanding expression plainly implied by the general context of the act, which has been omitted and which is necessary to prevent a legislative purpose from failing in one of its material aspects.' . . ." 415 F.2d at 716.

The Court reversed the judicial officer and refused to supply what the United States contended was inadver-

tently left out of the definition. Even though Congress had defined packer in other sections of the statute to include these words, and left them out of the section in question without explanation, the Court ruled that the language of the definition in question was clear and that there thus was "no need to resort to general rules of statutory construction." 415 F.2d at 717.

The Court of Appeals, in *DeSoto Securities* v. *Commissioner of Internal Revenue,* 235 F.2d 409 (7th Cir., 1956), rejected a taxpayer's contention that the words "paid or accrued" appearing in Section 505(a) of the Internal Revenue Code really meant only "accrued". The Court there said:

> "Section 505(a) (l) uses the words 'paid or accrued'. The Tax Court's decision has in effect construed the phrase 'paid or accrued' so as to eliminate the word 'paid'. We will not excide 'paid' or any other word which Congress placed in the Act. We shall determine the intention of Congress in conformity with the words it has used and not in the face of those words. The Courts can only interpret congressional acts. They cannot legislate." 235 F.2d at 411.

So also in this case, the Court is being asked to excide the words ". . . [f]or the purposes of the subsection. . ." and to write in their place, the words ". . . [f]or the purposes of computing readjustment pay. . .". O'Meara submits that the Court must reject the United States' position here for it is urging the Court to construe subsection (a) in the face of its clear terms. *DeSoto* accord., *General Electric Co.* v. *Southern Construction Co.,* 383 F.2d 135 (5th Cir., 1967), cert denied 390 US 955 (1967); see also *United States* v. *Sullivan,* 332 U.S. 689 (1948), *Chrestner* v. *Poudere Valley Cooperative Association,* 235 F.2d 946, 950 (10th Cir. 1956).

There can be no question but that the words of subsection (a), ". . . [f]or the purposes of this subsection. . .", apply the definitions which follow it to the entire subsection and not, as the United States contends, to only "computing the amount of readjustment payment. For example subsection (a) (1) of Section 687 is a definition of the word "continuous." According to its terms the word "continuous" includes interruptions in active duty which do not exceed 30 days. And the word "continuous" appears in the subsection's statement of eligibility, ". . . at least five years of *continuous* active duty." To read, the phrase, "for the purposes of this subsection" which proceeds the definition of "continuous" not as it is written but as the United States contends it should be written, i.e., as applying only to the benefits formula, would foreclose application of the definition of "continuous" to the subsection for any purpose, since it only appears in the eligibility statement, not in the benefits formula.

Consequently, as O'Meara contends, the statutory definitions which are contained in subsection (a) clearly and unequivocally apply to the subsection without limitation wherever the words defined are used. That is the way the statute is written, and O'Meara submits, that is the way it should be read by the Court.

a. That Subsection (a) Is A Codification Of Prior Laws Does Not Justify Ignoring Its Clear Terms.

The United States has announced in other cases involving this issue what it describes as a settled principle of statutory construction, that changes in statutory language, even if free of ambiguity, are not to be read as changes at all. It then asserts that that principle is especially

appropriate in this case where the clear change in language serves no purpose. It serves no purpose, the United States argues, because the reading of the statutory definition of "year" into the use of the word "year" in the eligibility statement is circuitous.[7]

The United States misconstrues the law. As early as 1880, this Court was held that the "plain meaning rule" is applicable to statutory revision. *United States* v. *Bowen*, 100 U.S. 508, 513-514 (1880); accord, *Continental Casualty Company* v. *United States*, 314 U.S. 527, 530 (1942). In *Bowen*, the United States sought to read out of a statute the word "such" which was plainly there. It argued that the word "such" changed substantially the predecessor statute and that the declared intent of the statute before the Court was to "revise and consolidate" not to change prior laws. The word "such" it was argued, was written into the statute by mistake.

This Court rejected that argument and followed the clear meaning, "when the meaning is plain, the Courts cannot look to the statutes that have been revised to see if Congress erred in the revision . . ." 100 U.S. at 513-514.

So also this Court declared in *Continental Casualty*, that where the revised form of the statute is clear, it ". . . is to be accepted as correct, notwithstanding a possible discrepancy." 314 U.S. at 530. Thus, a substantial change effectuated in prior law, by revision in the statute before the Court was enforced by the Court even though the change was made without explanation and in the face of the argument that it was inadvertently made.

---

[7] O'Meara responded to that argument earlier in his brief. Suffice it to say that as long as Congress writes its laws clearly the circuity of its draftsmanship must not be used as a device to rewrite what is free of ambiguity.

In a case strikingly similar to the case before the Court here, the United States Court of Appeals, Fifth Circuit, rejected the "settled principle of construction" the United States asserts here. *Barbee* v. *United States,* 392 F.2d 532 (5th Cir., 1968), cert. denied, 88 S. Ct. 1849 (1968). *Barbee* involved a recodification of a section of the federal criminal code. Defendant admitted that the literal reading of the relevant statute prescribed the conduct in which he engaged. However, he argued that the predecessor statute clearly did not prohibit that conduct, and that since the statute before the Court was a mere codification whose only relevant legislative history consisted of the general statement that "changes in phraseology were made", the recodification must be read as working no substantive change and its plain meaning must be discounted.

The Court rejected defendant's argument in *Barbee* and followed the codified section's clear terms.

Like the recodification in *Barbee, Continental Casualty* and *Bowen,* subsection (a) of Section 687 is clear on its face and must be read as it is written. The Court must reject the United States' "settle principle" because at best, it does not appear to be settled. Moreover, the cases on which the Government has in the past relied in support of this proposition do not stand for that proposition at all.

In *United States* v. *Cook,* 384, U.S. 257 (1966), this Court held that the meaning of the word "firm" included businesses conducted by an individual and that the use of the word "firm" in the statute was not intended to eliminate a firm that was run by an individual. Because the prior statute used a word different than "firm", the

appellee argued that the introduction of the word "firm" had in effect eliminated a sole proprietor in business from the statute. The court said:

> "Appellee relies particularly upon the abandonment of the words 'employee of any carrier' and the substitution of the present language of section 660 which does not expressly include the employee of 'any person' or 'any individual' doing business as a common carrier. But the term 'firm' is certainly broad enough in common usage to embrace individuals acting as common carriers; and in those instances where Congress has explicitly indicated its understanding of the term, the definition of 'firm' has included individual proprietorships. (Statutory citations omitted)." 384 U.S. at 260.

The Court then went on to note that there was no plausible reason for drawing the distinction between employees of sole proprietors and employees of partnerships or corporations. The need to regulate the industry was there whether or not the entity was owned by single person, a partnership or a corporation.

The language on which the United States apparently relies is the following:

> "On the other hand, since a large portion of common carriers are individually owned proprietorships, acceptance of appellee's interpretation of §660 would exclude a substantial segment of the industry from the coverage of the act—a result that should not be inferred from the 1949 'changes . . . in phraseology' without some specific indication that Congress receded from the intention it clearly expressed in the 1946 expanding coverage of the act to all carriers. (Reference to Senate Report omitted)." 384 U.S. at 264.

Clearly the Court did not espouse the principle that changes in statutory language resulting from codifications of the law do not ordinarily alter the meaning of the statute, although this is the principle the United States has derived from the case. The Court merely noted that the change in the statute asserted by the appellee would not appear to be a "change in phraseology" which the Senate report apparently indicated was the purpose of the statutory change.

Significantly, if there was such a proposition of statutory construction, the Court would have alluded to it in *Cook*. The fact that it did not indicates that there is no such proposition. Earlier in its opinion the court said:

> "There is no doubt that the 1946 statute covered employees of individuals and in our view it was not intended by adopting the 1948 revision of the code to make any substantive change of the law by excluding from its coverage the employees of any class of carrier who had been previously covered. The general purpose of the code was to 'codify and revise. . .'. The original intent of Congress is preserved (reference to the quotation in the Senate report omitted), and with respect to the new §660, the revisors, while noting the consolidation of a portion of §409 and §412 and stating that '(c)hanges were made in phraseology', disclosed no intention of making any change in the substantive content or the coverage of the law. See Legislative History note following 18 U.S.C. §660 (1964 ed.). To us the Congressional intent to reach the employees of any carrier, whatever form of business organization, seems reasonably clear." 384 U.S. at 260.

Again, in the foregoing language of the Court in *Cook*, there can be found no principle that codification ordinarily does not result in substantive change of the law. Each

codification is studied for ambiguity. And if it is found, then resort is had to legislative history. However, the Court applies no such rule of construction as the United States may advance, i.e., that codification is presumptively to effect no change in the statute.

Significant, also, the interpretation of the word "firm" by the Court in *Cook* is obviously sound. There is no exclusion of an individual enterprise from the meaning of the word "firm". The codification which occurred in the Cook case, therefore, is clearly just a difference in phraseology as the Senate report indicated. There was no change at all in Cook like the change that was made in subsection (a) before this Court. Here there is not merely a change in a word which had the same meaning as the word which was previously used. Rather, there is a complete change in terminology.

In *Ohio Bank and Savings* v. *Tri-County National Bank*, 411 F.2d 801 (6th Cir. 1969) which the United States has also in the past cited for the proposition that a codification does not ordinarily change the substance of the statute, likewise contains no such declaration by the Court. Again, this is purely the United States own "principle" of the case. The Court said:

> "Actually before the recodification of the Ohio code in 1953, the General Code section on branch banking read 'in other parts of the county or counties in which the municipal corporation containing the main bank is located'. The legislature deleted the words 'or counties' in the recodification, but a reading of Section 1.10(C) ORC (supra) with Section 1.24 ORC makes it clear that a substantive change was not intended. The latter section unequivocally states that no change in the law was intended by the recodification:

> 'in enacting this act it is the intent of the general assembly not to change the law as heretofore expressed by this section or sections of the general code in effect on the date of enactment of this act. The provisions of the Revised Code relating to the corresponding section or sections of the General Code shall be construed as restatements of and substituted in a continuing way for applicable existing statutory provisions, and not as new enactments.'" 411 F.2d at 803-804.

Clearly, with the statutory provision like that quoted above there is no need for, and the Court clearly did not announce, a principle that mere codifications do not ordinarily effect substantive changes in the law. If there is such a principle of statutory construction, there would be no need for the statutory statement quoted above with respect to the Ohio statute in question. Neither would the Court have to resort to such a statement of legislative intent if such a rule of statutory construction exists.

Significantly, the foregoing language of the statute is contained *in the statute*. It is not to be found in legislative history. Thus, the Court did not even resort to legislative history, and clearly had no need to resort to rules of statutory construction let alone the rule of statutory construction which the United States has announced is the principle of this case.

The United States has in the past intimated that effecuation of the "plain meaning" of subsection (a) would yield a "bizarre result"—and that in this case obvious policy considerations override the structures of the "plain meaning rule". In advancing this contention, the United States has placed primary reliance upon the language found in *Lynch* v. *Overholsen*, 369 U.S. 705, 710 (1962):

"The decisions of this Court have repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of the statute . . . for 'literalness may strangle meaning.'" That case involved interpretation and application of §24-301(d) of the D. C. Code, which provided in pertinent part:

> "If any person tried upon an indictment or information for an offense . . . is acquitted solely on the ground that he was insane at the time of its commission, the Court shall order such person confined in a hospital for the mentally ill."

Petitioner, in *Lynch*, had *not* affirmatively relied upon the defense of insanity; nevertheless, the trial court judge refused a proffered guilty plea, found petitioner not guilty by reason of insanity, and committed him to a "hospital for the mentally ill" pursuant to §24-301(d). In ordering petitioner's release, this Court indulged, *inter alia*, in the language above quoted. Critical to its decision was the Court's sensitivity to the "rule" that a statute "should be interpreted, if fairly possible in such a way as to free it from not insubstantial constitutional doubts." 369 U.S. at 711. And the use made of it by the trial court judge clearly raised grave due process problems. Further, the proposition for which the United States has previously cited *Lynch*—that "resort to legislative history is particularly appropriate in order to avoid a bizarre result—*such as turning a codification into a substantive amendment*"—is not even remotely suggested by the case itself. Moreover, the reading of subsection (a) of Section 687 suggested by the petitioners here patently does not issue a "bizarre result". Its manifest purpose is to provide a compensation increment to those who had

served a substantial period of "active duty." The issue raised by this case leaves untouched this basic and *overriding* element of Congressional intent. The teaching provided by the second case often cited by the United States, *United States* v. *Bryan*, 339 U.S. 323, 338 (1950) (where the Supreme Court rejected a construction of a statute which was "contrary to the congressional intent and leads to absurd conclusions"), is likewise similarly inapposite.

It should also be noted that other cases in which literalism is disapproved almost invariably involve a relevant ambiguity. See, e.g., *United States* v. *Anaconda Wire and Cable Company*, 342 F. Supp. 1116 (S.D.N.Y. 1972). In that case it was found that the critical "language punctuated as it is, notably ambiguous." 342 F. Supp. at 1119. Such a finding renders subsequent language disapproving "a cramped construction blindly applying the language of the statute to an unanticipated situation" mere surplusage—as well as misleading.

Once again, O'Meara asserts that subsection (a) is free from ambiguity. Given that, any principle, settled or otherwise, that codification does not effect substantive change, must yield to the subsection's clear terms.

4. Assuming, Arguendo Only, That Subsection (a) Is Ambiguous, Its Legislative History Does Not Solve That Ambiguity To The Extent That The Apparent Meaning Of The Subsection's Terms Should be Disregarded.

O'Meara submits that subsection (a) is free of ambiguity, that its clear definition of "year" must be read into the use of that word in its eligibility statement, and that the Court must not resort to legislative history to

create an ambiguity or find a mistake and then rewrite the subsection to correct it. Yet for argument purposes only, O'Meara will discuss legislative history to illustrate that it does not solve any ambiguity and that it does not indicate a mistake was made.

a. Subsection (a) And Its Predecessors.

The United States always, and accurately, points out that the predecessor to subsection (a) clearly limited the application of the definition of "year" to the subsection for only *one* purpose, "computation of readjustment benefits." In the present subsection (a), the definition applies to the subsection without limitation. This comparison of statutory language is compelling evidence that Congress intended the change it plainly made, not, as the United States argues, that it meant no change in phraseology. Thus, O'Meara submits, this legislative historical fact supports petitioners' position.

b. The Senate Report Accompanying What Is Now Subsection (a) Of Section 687.

The Senate report accompanying the bill which included what is now subsection (a) states generally that the bill is not intended to make any substantive change, rather that it is a codification of prior laws. Moreover, the report makes no mention in its list of statutory changes, of the change in what is now subsection (a) which removed the limitation of the subsection's definition of years.

However, these legislative facts can hardly be said to overcome the plain change which was obviously intended when the comparison is made between the *statutory language* of the repealed law and the present subsection (a).

Moreover, as the Court in *Schmid* observed, the original subsection actually used the language of the present subsection (a) but changed it to" . . . (f)or the purposes of computing readjustment payment" because the Comptroller General pointed out tha tthe definition of year should apply *only* for computation of benefits, not for any other purpose. 436 F.2d 987. Thus, the restoration by Congress in the present subsection of language which it had already been advised would make the definition of "year" apply to the use of that word in the subsection's eligibility statement is additional evidence that Congress meant to write what it actually wrote. But at the very least, it is, O'Meara submits, sufficient to place substantial doubt on the omniscience of the author of the Senate report.

The United States purports to find further legislative historical support for its contention from the lack of legislative hearings or even inquiries on the question whether the eligibility period should be reduced. It then has represented that such a reduction in the eligibility period would substantially increase the United States' liability, and then refers to a fact *not in the record,* that the increase in liability approximates $12,000,000.00.

O'Meara submits that this lack of hearings has only minor significance, and then only if there was a proven need for the hearings. Certainly, hearings were in order when Congress first enacted the bill in 1956 because the benefits had never before existed and the creation of them surely would have "substantial" impact on the United States' liability for benefits. Also, when the formula for computing benefits was changed from "one-half a month's basic pay" to "two months' basic pay" there may have been arguable need for hearings. But where the eligibi-

lity period is reduced by six months, there hardly appears to be any substantial impact in United States' liability. All it would have to do to avoid liability is to release its armed forces reservists from active duty before they satisfy the eligibility period, just as it attempted to avoid liability in O'Meara's case by releasing him thirteen days short of his five years of active duty. The only reason the United States could possibly be exposed to a liability is because it did not adhere to the plain meaning of the 1962 change in language of section (a), and did not interpret the subsection as it was written. Liability is purely under the control of the United States. It can either release the men before eligibility, or it can incur the liability.

No doubt this is the explanation why Congress held no hearings to consider the issue of liability created by the 1962 change in language. O'Meara therefore submits that the lack of hearings cannot be of such significance to solve the purported ambiguity.

c. Administrative Interpretation Of Subsection (a).

Finally, the United States resorts to the self serving indicia of administrative interpretation. O'Meara submits that the interpretation of those who are attempting to avoid the language change must be considered so far removed in terms of probity as to carry little if any weight. Significantly, the Marine Corps order 1900. 1 H(7) provides that the readjustment payment only applies to reserve offices; whereas, the statute makes no distinction between officers or enlisted men.

To claim, as the United States evidently does, that current administrative practice *is* the one mandated by

subsection (a) because it is the one followed by those agencies charged with its effectuation makes garden variety "bootstrapping" appear sophomoric by comparison. The case previously relied upon by the United States in support of its contention that relevant administrative practice "should be followed unless there are compelling indications that it is wrong", *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 381 (1969), is inapposite for purposes of this case. *Red Lion* involved a challenge of a regulatory structure—consisting of a substantive and procedural agency which made rules under the following circumstances: broad statutory authorization—in the form of (i) *general* statutory language and (ii) express rule-making authority; a regulatory scheme which had continued in force and substantially unchanged for over 30 years—thereby giving Congress ample opportunity to "speak out" had it felt that such scheme conflicted with the terms of the relevant statute. The case before this Court, by way of comparison, offers the following: a very specific provision which leaves no room for agency discretion; a regulatory scheme marked by a considerable degree of flux; additionally, there is no readily apparent reason why the change worked by the 1962 revision would have come to the responsible agencies' attention prior to institution of the recent relevant litigation.

With respect to the propriety of *not* deferring to relevant administrative interpretation, the principle that resolution of what a statute *means* is primarily the *independent* function of the courts is plentiful. See, *e.g.*, *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944): "Undoubtedly questions of statutory interpretation . . . are for the courts to resolve . . . ." 322 U.S. at 130-131.

Finally, there *are* "compelling indications that (the responsible agencies) are wrong": *i.e.*, the clear and unambiguous terms of subsection (a) itself.

In sum, then O'Meara submits that, even if there is an ambiguity, arguendo only, and there is none, the legislative history is not clear in its support of the position of the United States. Rather, the legislative history indicates support more for petitioners' contention that Congress intended the change it made. But at the very best it is clearly capable of conflicting interpretations, and, therefore, does not solve, but creates an ambiguity. As such it must be disregarded in favor of the subsection's clear meaning. *United States* v. *Shreveport Grain Elevator*, 287 U.S. 77 (1932) O'Meara submits that the Court must reject the United States' search for ambiguity or inadvertance in history, and read subsection (a) the way Congress plainly wrote it.

5. The Decision Of The Court Of Appeals In Cass Must Be Reversed And The Decisions Of The District Courts Affirmed.

As O'Meara pointed out early in this brief, the reported and unreported decisions on this precise issue number at least eleven (11). All these decisions, save one, have reasoned that subsection (a) is free of ambiguity in its mandate that the definition of "year" is to be read into the use of that word in the subsection's eligibility statement. Only the Court of Appeals in *Cass*, has reasoned to the contrary. O'Meara respectfully submits that the decision of the Court of Appeals in *Cass* must be reversed and the District Courts affirmed.

The essential point upon which O'Meara contends that the Court of Appeals decision in *Cass* should not be fol-

lowed is that the Court finds ambiguity in subsection (a) where, O'Meara submits, there is none. It purportedly finds ambiguity in the circuitous, but clear, language of the subsection which requires that the definition of "year" be read into the use of that word in the eligibility statement. That, O'Meara submits, does not create the ambiguity necessary as a predicate to resorting to legislative history. The phrase, "For the purposes of this subsection", clearly refers to the entire subsection (a) of Section 687 which includes *both* the five year eligibility requirement and the formula for computing the statutory benefits. The clarity of the subsection's terms cannot be made ambiguous solely by, what a Court believes, is circuitous, albeit clear, draftsmanship. It is certainly no more circuitous than reading the subsection's definition of "continuous" into the use of that word in the eligibility statement.

And without ambiguity on the face of the subsection, the Court must not resort to history to find it. It is not the function of courts to utilize legislative history to rewrite an other wise clear and precise statute, O'Meara submits the clear terms of the statute must prevail, and that they do not prevail in the decision of the Court of Appeals in *Cass*.

CONCLUSION

For the above reasons, John N. O'Meara respectfully urges this Court to reverse the Court of Appeals in *Cass* and to affirm the District Courts.

Respectfully submitted,

KEVIN M. FORDE, LTD.
111 W. Washington Street
Chicago Illinois 60602

ROGER J. KILEY, JR., LTD.
EDWARD T. JOYCE, LTD.
77 West Washington Street
Chicago, Illinois 60602
Attorney for Amicus Curiae

Certificate of Service

I, Kevin M. Forde, attorney for amicus, hereby certify that three copies of this brief were duly served upon attorneys for all parties by mail service, postage prepaid.

Kevin M. Forde, Ltd.

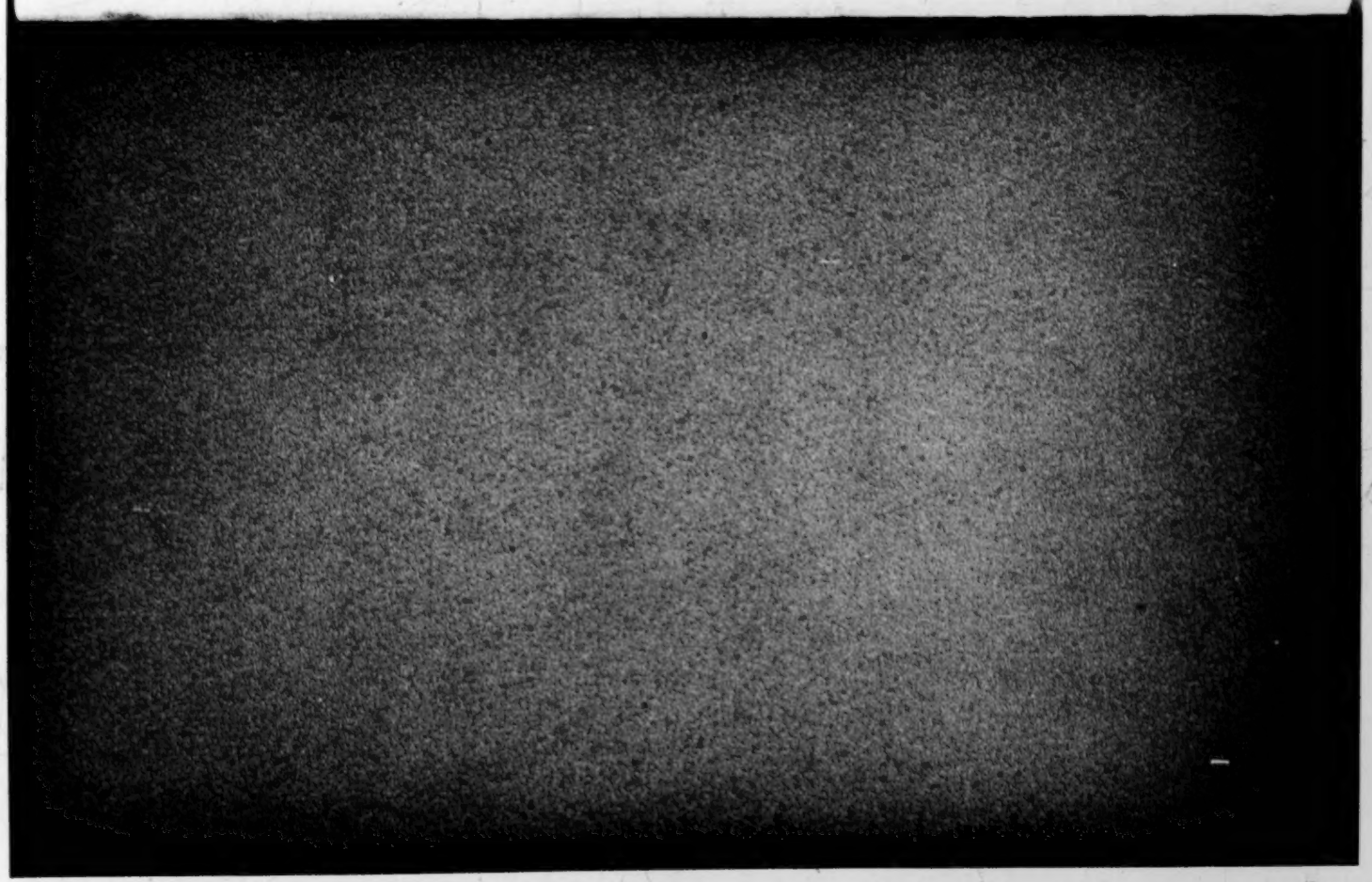
ADDENDUM

687. *Non-regulars—Readjustment Payment upon involuntary release from active duty.* (a) Except for members covered by subsection (b), a member of a reserve component or a member of the Army or the Air Force without component who is released from active duty involuntarily or because he was not accepted for an additional tour of active duty for which he volunteered after he had completed a tour of active duty, and who has completed, immediately before his release, at least five years of continuous active duty as a commissioned officer, warrant officer, or enlisted member, is entitled to a readjustment payment computed by multiplying his years of active service, but not more than 18, by one-half of one month's basic pay of the grade in which he is serving at the time of his release. For the purposes of this subsection—

(1) a period of active duty is continuous if it is not interrupted by a break in service of more than 30 days;

(2) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded; and

(3) a period for which the member concerned has received severance pay under another provision of law may not be included.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-604

DONALD C. CASS, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONER

ARTHUR B. HANSON
ARTHUR A. BIRNEY
JOHN N. FENRICH, JR.
HANSON, O'BRIEN, BIRNEY,
STICKLE AND BUTLER
888 Seventeenth Street, N.W.
Washington, D.C. 20006
298-6161
Attorneys for Petitioners

Of Counsel:

CHARLES A. SMITH
SMITH & HARPER
2210 North Roberts
Helena, Montana 59601

February 21, 1974

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-604

DONALD C. CASS, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States District Court for the District of Montana dated June 20, 1972 has been published at 344 F.Supp. 550, and is printed as Appendix A of the Petition For Certiorari. The opinion of the Court of Appeals for the Ninth Circuit dated August 1, 1973 has been published at 483 F.2d 220 and is printed as Appendix B of the Petition For Certiorari.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 1, 1973. The Petition For Writ Of Certiorari was filed on October 5, 1973 and was granted on January 7, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

10 U.S.C. § 687(a) provides in pertinent part:

> "Non-Regulars: readjustment payment upon involuntary release from active duty
>
> (a) Except for members covered by subsection (b), a member of a reserve component or a member of the Army or the Air Force without component who is released from active duty involuntarily, or because he was not accepted for an additional tour of active duty for which he volunteered after he had completed a tour of active duty, and who has completed, immediately before his release, at least five years of continuous active duty, is entitled to a readjustment payment computed by multiplying his years of active service (other than in time of war or of national emergency declared by Congress after June 28, 1962), but not more than eighteen, by two months' basic pay of the grade in which he is serving at the time of his release. . . . For the purposes of this subsection—
>
> (1) a period of active duty is continuous if it is not interrupted by a break in service of more than 30 days;
>
> (2) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded; * * * "

QUESTION PRESENTED

Whether an individual involuntarily released from active duty with the Armed Forces is entitled to readjustment pay in accordance with 10 U.S.C. § 687(a) where such individual has served more than four years and six months, but less than five years, of continuous active duty.

STATEMENT OF THE CASE

As a member of the United States Army Reserve, the Petitioner served a tour of active duty with the United States Army from July 16, 1966 to April 26, 1971 at which time the Petitioner was honorably and involuntarily released from active duty, having completed four (4) years, nine (9) months and thirteen (13) days of continuous active duty. (App. 6, 7). At the time of his involuntary release from active duty Petitioner had attained the rank of Captain and was receiving a base pay of $1,063.80 per month. (App. 6).

On April 20, 1971, Petitioner requested from the Department of the Army a lump-sum readjustment payment in the sum of $10,638.00 which was the amount of readjustment payment due calculated in accordance with the provisions of 10 U.S.C. § 687(a) under the assumption that Petitioner was eligible for a readjustment payment. Petitioner's request was denied. (App. 7).

Petitioner brought suit against the United States in the United States District Court for the District of Montana and for jurisdictional purposes waived all readjustment pay due in excess of $10,000. (App. 3, 4). The parties stipulated to the above recited facts and agreed that on the basis of these facts the District Court should determine whether Petitioner was en-

titled to the readjustment payment prayed for in accordance with 10 U.S.C. § 687(a). (App. 6-8).

The District Court relied upon the decision of the Court of Claims in *Schmid* v. *United States,* 436 F.2d 987 (Ct.Cl. 1971), *cert. denied,* 404 U.S. 951 in concluding that the rounding provision, 10 U.S.C. § 687 (a)(2), applies to both eligibility for and the computation of a readjustment payment. (App. 12). The District Court therefore entered judgment for Petitioner in the sum of $10,000. (App. 11).

The Government appealed the District Court's decision to the Court of Appeals for the Ninth Circuit. (App. 10). The Court of Appeals reversed, rejecting the interpretation of 10 U.S.C. § 687(a)(2) rendered by the Court of Claims in *Schmid* and relied upon by the District Court. The Court of Appeals concluded that the rounding provision of 10 U.S.C. § 687(a) applies only to the determination of the amount of readjustment payment, and not to the eligibility requirement for readjustment pay.

SUMMARY OF ARGUMENT

The language of the statute at issue in this case clearly indicates that the Petitioner's construction of the statute is the only reasonable construction. The plain and unambiguous meaning of 10 U.S.C. § 687(a) requires that the rounding provision as to portions of a year of active service is applicable to the determination of eligibility for readjustment pay as well as to the computation of the amount. The Court of Appeals reached a contrary construction because it failed to adhere to the plain meaning of the statute and because it failed to follow the established rules of statutory construction.

The Court of Appeals failed to recognize the plain meaning of § 687(a) because it isolated the language pertaining to eligibility—"at least five years of continuous active duty"—from the relevant rounding provision—"For the purposes of this subsection . . . a part of a year that is six months or more is counted as a whole year. . . ." The Court erroneously concluded that the rounding provision was not compatible with or functional with the eligibility clause when, in fact, it is clear that the two provisions are readily harmonized. Additionally, Congress has expressly adopted an identical rounding provision for the purpose of determining eligibility under a similar statute.

The Court of Appeals failed to recognize the plain meaning of § 687(a) because it resorted to legislative history as an aid to construction of the statute. Where the meaning of a statute is clear from the face of the statute, legislative history should not be examined to determine whether congressional intent conflicts with the plain meaning of the statute. This well-established rule of statutory construction was clearly violated by the Court of Appeals which attempted to demonstrate that Congress did not intend to change the language of the former readjustment pay statute by its codification in § 687(a). In any event, the legislative history of § 687(a) is not so conclusive as to dictate a disregard of the plain meaning of the statute.

ARGUMENT

I. The Plain Meaning of 10 U.S.C. § 687(a) Indicates that the Rounding Provision Applies to the Eligibility for, as Well as the Computation of, Readjustment Pay

The statute at issue in this case, 10 U.S.C. § 687(a), reads in pertinent part:

> "Non-Regulars: readjustment payments upon involuntary release from active duty.

(a) Except for members covered by subsection (b), a member of a reserve component or a member of the Army or the Air Force without component who is released from active duty involuntarily, or because he was not accepted for an additional tour of active duty for which he volunteered after he had completed a tour of active duty, and who has completed, immediately before his release, at least five years of continuous active duty, is entitled to a readjustment payment computed by multiplying his years of active service (other than in time of war or of national emergency declared by Congress after June 28, 1962), but not more than eighteen, by two months' basic pay of the grade in which he is serving at the time of his release. * * * *For the purposes of this subsection*—

(1) a period of active duty is continuous if it is not interrupted by a break in service of more than 30 days;

(2) *a part of a year that is six months or more is counted as a whole year,* and a part of a year that is less than six months is disregarded; * * * " (emphasis added)

Petitioner submits that the plain, unequivocal and unambiguous language of this statute provides that four years nine months and thirteen days of continuous active duty must be equated to five years of continuous active duty for all purposes of the statute. Since Petitioner served this period of continuous active duty, he is eligible for readjustment pay, having served five years of continuous active duty within the meaning of the statute.

The statute clearly provides that "For the purposes of" the application of the statute "a part of a year that is six months or more is counted as a whole year." The prefatory phrase is not limited. There are clearly two

"purposes" for which this rounding provision may apply—first, in determining whether a reservist has completed "at least five *years* of continuous active duty", and is therefore eligible for readjustment pay, and secondly, in computing the "*years* of active service" for the purpose of determining the amount of readjustment pay. Nothing in the words of the statute indicates that § 687(a)(2) applies only to the computation of the amount of readjustment pay or that the procedure for computing the number of "years" of continuous active duty for determining eligibility is in any way different from the procedure for computing the number of "years" of active service for determining the amount of pay.

This Court need go no further than to determine the plain meaning of 10 U.S.C. § 687(a) in order to recognize the validity of the Petitioner's claim. *United States* v. *Sullivan,* 332 U.S. 689 (1948); *Caminetti* v. *United States,* 242 U.S. 470 (1917).

> "Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise . . . ." 242 U.S. at 485.

Since the statute, on its face, entitles the Petitioner to a readjustment payment, the decision of the Court of Appeals should be reversed.

The view of the Court of Appeals that the language of 10 U.S.C. § 687(a) does not mean what it says was first presented by the Government before the Court of Claims in *Schmid* v. *United States,* 436 F.2d 987 (Ct. Cl. 1971), *cert. denied,* 404 U.S. 951. Lieutenant Schmid was the first individual to challenge in court the misapplication of 10 U.S.C. § 687(a) by the military departments which have denied readjustment pay to

those, like the Petitioner, who were released from active duty just short of five years of actual continuous active duty. The Court of Claims rejected the Government's attempt to circumvent the plain meaning of § 687(a), stating:

> "We find that the section is clear and unambiguous on its face and is susceptible, on its face, of only one interpretation . . . Congress imposed no express or implied limitation on the applicability of this rounding provision. The clear indication is that, in determining eligibility for readjustment pay and in computing the amount thereof, a period of 6 months or more is counted as a whole year." 436 F.2d at 989.

Other courts have construed 10 U.S.C. § 687(a) in complete agreement with the *Schmid* decision. In the case before this Court, the District Court of Montana, Helena Division, emphasized the language of the statute—"For the purposes of this subsection . . . a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded" and, relying upon *Schmid,* concluded that the rounding provision applies to both eligibility for and the computation of readjustment pay. *Cass* v. *United States,* 344 F. Supp. 550 (1972), *rev'd,* 483 F.2d 220 (9th Cir. 1973). An unpublished decision of the District Court for the Central District of California, which was also reversed by the decision below, was based upon the interpretation of the statute expressed in *Schmid.* See 483 F.2d at 221.

The Court of Appeals adopted a contrary construction of 10 U.S.C. § 687(a) because it went beyond the plain meaning of the statute and found that, *by implication,* the statute limited the rounding provisions

to the computation of the amount of benefits. The court isolated the clause of the statute which sets the minimal eligibility at "five years of continuous active service" and found that this clause is clear on its face and not subject to any interpretation other than a requirement for five complete and actual years of continuous active duty.

The eligibility clause of § 687(a) may be clear on its face, but it was error for the court not to recognize that one clause of a statute may be modified by another clause or by a definition within the statute. Words within a statute must be interpreted in accordance with the entire context of the statute. The eligibility clause of § 687(a) cannot be construed in isolation from the remaining language of the statute.

The statute at issue contains a specific provision regarding the term "year" for purposes of the use of that term within the statute. In the absence of an express restriction to the contrary, it must be assumed that a term is used throughout a statute in the same sense in which it is defined. *Pampanga Sugar Mills* v. *Trinidad,* 279 U.S. 211 (1929). Where a term is defined within a statute this definition will control over what a court would otherwise deem to be an alternative meaning of the term. *Thornton* v. *Comm'r,* 159 F.2d 578 (7th Cir. 1947). Moreover, a specific section of a statute qualifies and governs a general section dealing with the same subject matter. *Monte Vista Lodge* v. *Guardian Life Insurance Co. of America,* 384 F.2d 126 (9th Cir. 1967). The meaning of the term "year" throughout § 687(a) is therefore controlled by § 687(a)(2) since, as even the Court of Appeals recognized, § 687(a)(2) is not expressly restricted in its application. 483 F.2d at 222. The clause

relating to years of active service required for eligibility cannot be read in isolation from the rounding provision, and it was error for the Court of Appeals to do so.

The court below found that even if the eligibility requirement is not read in isolation from the rounding provision, the rounding provision conflicts with the clear preceding statement that five years of continuous active duty is required for eligibility. Petitioner contends that the Court of Appeals has looked for a conflict that does not exist. Different portions of a statute should not be held to be repugnant to each other if they can be reconciled. *Montgomery Charter Service* v. *Washington Metropolitan Area Transit Comm'n.*, 325 F.2d 230 (D.C. Cir. 1963). As the Petitioner has demonstrated, the clause relating to the eligibility requirement and the rounding provisions of § 687(a) are easily harmonized when it is recognized that the term "years" in the eligibility clause is expressly defined and modified by the rounding provisions of § 687(a)(2). The rounding provision is thus integrated into the eligibility requirement without any conflict.

The Court of Appeals was reluctant to follow the plain meaning of § 687(a) because it determined that the application of the rounding provision to the eligibility requirement would serve no useful purpose. 483 F.2d at 222. Since the rounding provision is relevant to the question of eligibility for readjustment pay only where a serviceman has served between four and one-half and five years of continuous active duty, the court could not find any apparent reason why Congress would adopt such a circuitous method to determine eligibility. However, independent evidence exists

that Congress has explicitly approved of this method of determining eligibility.

A statute similar to § 687(a) deals with retainer pay for enlisted members transferred to the fleet reserve. 10 U.S.C. § 6330.[1] That statute sets forth the number of years required for eligibility in a subsection separate from the provision regarding the computation of the payment. The rounding provision of § 6330 is identical to that of § 687(a)(2) and it is expressly applicable to each of the separate subsections dealing with eligibility and computation. There is no doubt that Congress intended for the rounding provision of § 6330 to apply in determining whether the requisite years for eligibility are met, even though the

---

[1] § 6330 reads, in pertinent part:

Enlisted members: transfer to Fleet Reserve and Fleet Marine Corps Reserve; retainer pay

(a) • • •

(b) An enlisted member of the Regular Navy or the Naval Reserve who has completed 20 or more years of active service in the armed forces may, at his request, be transferred to the Fleet Reserve. An enlisted member of the Regular Marine Corps or the Marine Corps Reserve who has completed 20 or more years of active service in the armed forces may, at his request, be transferred to the Fleet Marine Corps Reserve.

(c) Each member who is transferred to the Fleet Reserve or the Fleet Marine Corps Reserve under this section is entitled, when not on active duty, to retainer pay at the rate of 2½ percent of the basic pay that he received at the time of transfer multiplied by the number of years of active service in the armed forces. • • •

(d) *For the purposes of subsections (b) and (c), a part of a year that is six months or more is counted as a whole year and a part of a year that is less than six months is disregarded.* • • • 10 U.S.C. § 6330. (Emphasis supplied).

rounding provision confers eligibility only upon enlisted members with active service between nineteen and one-half and twenty years of active service.

The application of the rounding provision to determine eligibility for purposes of 10 U.S.C. § 687(a), as construed by Petitioner, is no more circuitous or useless than the application of the rounding provision to determine eligibility for purposes of 10 U.S.C. § 6330. Where the meaning of a statute is clear, a court should not question the appropriateness of the statute's provisions and should not substitute the court's language for that expressed in the statute. *Helvering* v. *Hammel,* 311 U.S. 504 (1941); *Caminetti* v. *United States,* 242 U.S. 470 (1917); *Arkansas Valley Industries* v. *Freeman,* 415 F.2d 713 (8th Cir. 1969). The Court of Appeals construed the statute in terms of what the court felt Congress should have said rather than in terms of what the statute actually says. The court's opinion does not set forth sufficient reasons for rejecting the plain meaning of the statute as construed by the Petitioner and the Court of Claims in *Schmid, supra.*

II. Resort to the Legislative History of 10 U.S.C. § 687(a) as an Aid to Construction Is Unnecessary and Improper

The Court of Appeals resorted to the legislative history of 10 U.S.C. § 687(a) in order to buttress its interpretation of the statute. The Court's method of statutory construction violated the rule, well established by this Court, that where there is no ambiguity in a statute, resort to legislative history in order to construe the statute is unnecessary and improper. See *United States* v. *Oregon,* 366 U.S. 643 (1961); *Ex Parte Collett,* 337 U.S. 55 (1949); *Helvering* v. *City*

Bank Farmer's Trust Co., 296 U.S. 85 (1935); *United States* v. *Shreveport Grain and Elevator Co.*, 287 U.S. 77 (1932).

Even though the Court of Appeals found that the legislative history of 10 U.S.C. § 687(a) raises a doubt as to whether Congress intended to apply the rounding provision to the eligibility requirement, it was not proper for the court to controvert the plain meaning of the statute by seeking to show an inconsistent legislative intent. See *Sea-Land Service, Inc.* v. *Federal Maritime Comm'n.*, 404 F.2d 824 (D.C. Cir. 1968). The legislative history of a statute, such as committee reports, should not be used to create an ambiguity out of an otherwise clear and unequivocal statute. *Callahan* v. *United States*, 364 U.S. 587 (1961); *United States* v. *Rice*, 327 U.S. 742 (1946); *Helvering* v. *City Bank Co., supra; Railroad Comm'n. of Wisconsin* v. *Chicago, Burlington & Quincy R.R.*, 257 U.S. 563 (1922). This view was put forth by this Court most clearly in *United States* v. *Shreveport Grain and Elevator Company, supra.* In that case the Government attempted to rely upon the House and Senate reports to clarify the meaning of an act which the Government was urging the Court to construe in accordance with the Government's view. This Court rejected this attempt, stating:

> "In proper cases, such reports are given consideration in determining the meaning of a statute, but only where that meaning is doubtful. They cannot be resorted to for the purpose of construing a statute contrary to the natural import of its own terms. * * * Like other extrinsic aids to construction their use is to 'solve, but not to create, an ambiguity.' * * * 'If the language is clear, it is conclusive. There can be no construc-

tion where there is nothing to construe.'" 287 U.S. at 83. (Citations omitted).

There is no ambiguity within the four corners of 10 U.S.C. § 687(a). The statute clearly provides that the rounding provision is applicable to the determination of eligibility as well as to the computation of readjustment pay. The mere claim by the Government or the Court of Appeals that the statute is ambiguous should not persuade this Court to rely upon the legislative history of the statute. An inaccurate allegation of ambiguity does not justify the use of legislative history to vary the meaning of clear and unambiguous statutory language. *Montgomery Charter Service, Inc.* v. *Washington Metropolitan Area Transit Comm'n*, 325 F.2d 230 (D.C. Cir. 1963).

III. The Plain Meaning of a Codified Statute Should Not Be Altered by Resort to the Language of the Former Statute

The Court of Appeals found that the legislative history of § 687(a) requires that the language of a predecessor readjustment pay statute controls the meaning of the present statute. Petitioner contends that this mode of statutory construction was erroneous since it permitted the court to cast aside the plain meaning of the present statute.

The original statute providing for military readjustment payment expressly limited the rounding provision to the computation of the amount of the payment.[2]

[2] The original statute read in pertinent part:

"A member of a reserve component who is involuntarily released from active duty after the enactment of this section and after having completed immediately prior to such release at least five years of continuous active duty, except for a break in service of not more than thirty days . . . is entitled to a

In 1962 Congress codified this statute and simultaneously repealed the 1956 Act. Act of September 2, 1962, P.L. 87-651, 87th Cong., 76 Stat. 506. The codified section is the present 10 U.S.C. § 687(a). The codification changed the preface to the rounding provision from "For the purpose of computing the amount of readjustment payment. . . . " to "For the purposes of this subsection. . . . " As Petitioner has demonstrated, this change clearly makes the rounding provision applicable to the determination of eligibility for readjustment payment as well as the computation thereof. However, the Court of Appeals found that Congress did not intend to make such a change because the Senate report accompanying the new bill stated that the bill "is not intended to make any substantive change in the existing law." 483 F.2d at 222, quoting from S. Rep. No. 1876, 87th Cong., 2d Sess. (1962). Instead of referring to the plain meaning of the present statute, the Court of Appeals felt bound by the statement in the Senate Report to follow the language of the repealed 1956 Act in construing § 687(a). The decisions of this Court show that this method of construing § 687(a) was improper.

As early as 1880 this Court held that a court should not look to a predecessor statute in construing a statute which is unambiguous. In *United States* v. *Bowen*, 100 U.S. 508 (1880), the Government attempted to read

---

lump-sum readjustment payment computed on the basis of one-half of one month's basic pay in the grade in which he is serving at the time of release from active duty for each year of active service ending at the close of the eighteenth year. *For the purpose of computing the amount of readjustment payment (1) a part of a year that is six months or more is counted as a whole year . . .*" (Emphasis added) Act of July 9, 1956, 70 Stat. 517, 50 U.S.C. § 1016(a) (1958 ed.).

a word out of a statute because the word caused a substantial change to occur in the predecessor statute. The Government argued that the court should consider the word as a mistake because the statute before the Court was merely a revision and consolidation of prior law and Congress had declared that there was no intent to change the prior law. This Court rejected the Government's approach, stating:

> "When the meaning is plain, the Courts cannot look to the statutes which have been revised to see if Congress erred in that revision . . ." 100 U.S. at 513.

Another case decided by this Court supports this view. *Continental Casualty Co.* v. *United States,* 314 U.S. 527 (1942) involved a revised statute, relating to the default of a bond, which substituted the word "party" for the word "parties" contained in the earlier statute. This Court had to determine whether the later statute applied only to the principal or to the principal and his surety. The Court followed the plain meaning of the current statute, restricting its application to only one "party," despite the indication that Congress did not intend to make any change by the revision.

> "The change to the singular in the Revised Statutes was made without any explanation of its purpose and indeed without the brackets or italics used to indicate a repeal or amendment. . . .The revised form, however, is to be accepted as correct. notwithstanding a possible discrepancy." 314 U.S. at 530.

Since the meaning of § 687(a) is clear on its face, it is not necessary or proper to determine whether Con-

gress intended to change the meaning of the 1956 Act by virtue of the 1962 codification thereof. If the Executive Branch of the Government believes that five actual years of active service should be required to receive readjustment pay, it should attempt to have § 687(a) amended by Congress rather than by an erroneous court construction of the statute.

IV. Assuming, Arguendo, that Resort to the Legislative History of § 687(a) Is Necessary, the Statute's Legislative History Is Not So Clear as to Dictate a Disregard of the Clear Meaning of the Statute

Even assuming that the Court of Appeals was justified in resorting to the legislative history of § 687(a), that court incorrectly concluded that Congress did not intend to broaden the eligibility requirements for readjustment pay by virtue of the 1962 codification of the 1956 act.

The 1956 statute originated as H.R. 9952. As it was passed by the House the bill read, in pertinent part:

> "SEC. 260. (a) A member of a reserve component who is involuntarily released from active duty after having completed immediately prior to such release at least 5 years of continuous active duty, except for breaks in service of not more than 30 days, as either an officer, warrant officer, or enlisted person, is entitled to a lump-sum readjustment payment computed on the basis of one-half of 1 month's basic pay in the grade in which he is serving at the time of release from active duty for each year of active service ending at the close of the 18th year. *For the purposes of this subsection, a part of a year that is 6 months or more is counted as a whole year, and a part of a year that is less than 6 months is disregarded.* * * *

(Emphasis supplied.) H.R. 9952, 84th Cong., 2d Sess. (1956).

The Senate then amended the House bill. The rounding provision of the House bill was amended in accordance with a recommendation contained in a letter, dated November 17, 1955, from the Comptroller General to Senator Russell, Chairman of the Committee on Armed Services, commenting on a similar bill. That letter stated, in pertinent part:

> "Although the language of subsection (a) of the bill seems to indicate that a minimum of 5 years' continuous active duty as an officer or warrant officer is necessary to qualify for a readjustment payment, the last sentence of that subsection appears to reduce the minimum qualifying service to 4 years and 6 months. Presumably the provision authorizing the counting of 6 months or more as a whole year was intended to apply only for the purpose of computing the amount of a lump-sum payment and not the quantum of qualifying service. If so, the language should be clarified, perhaps somewhat as follows:
>
> "For the purpose of computing the amount of the readjustment payment a fractional part of a year amounting to 6 months [or 183 days] or more shall be counted as a whole year and a shorter period shall be disregarded." 1956-2 U.S. Code Cong. & Adm. News 3068, 3070.

The rounding provision of section 687(a) contains the same language as the rounding provision of the original House readjustment pay bill set forth above. It is more reasonable to assume that the language of § 687(a) was intentionally drafted to conform to the original House bill than to assume that the identity of language is coincidental. This implies a legislative

intent to broaden the applicability of the rounding provision by virtue of the 1962 codification. The Court of Claims recognized this in *Schmid, supra*:

> "The restoration in section 687(a) of the language of H.R. 9952, that which the Comptroller viewed as reducing the minimum qualifying service to 4 years and 6 months, is, we think, a strong indication of congressional intent—far stronger than that on which the defendant relies. We do not mean to say that the legislative intent underlying section 687(a) is in accord with the clear meaning of the statutory words, only that the legislative history of that section does not so clearly evidence an intent inconsistent with the plain meaning of the statutory language as to enable us to depart from that plain meaning." 436 F.2d at 991.

The Court of Appeals reasoned that the statement in the 1962 Senate Report that Congress did not intend to make any substantive change in existing law evidenced Congressional intent not to broaden the rounding provision to include the determination of eligibility. This reasoning is clearly premised upon the assumption that a decrease in the eligibility requirement by six months constitutes a "substantive change" in the effect of the statute. However, it is apparent that the change in the minimum eligibility from five years to four years and six months was not a substantive change as far as Congress was concerned.

The purpose of the original readjustment pay statute was to assist involuntarily separated reserve officers in their re-establishment as civilians where such officers have reenlisted, after their initial obligation, with the idea of continuing their service. Congressman Brooks, an advocate for the original 1956 House read-

justment pay bill, explained the rationale for the eligibility requirement:

> "MR. BROOKS. That is correct. The reason for the 5 years, of course, is that a 3-year enlistment would require a reenlistment or, if you put it this way, a man who is in for 4 years will have to reenlist for an extended period. After he completes the first enlistment I think he intends to stay in the service and this encourages him to stay in the service as long as the service needs him." 102 Cong. Rec. 10118-19 (1956).

Therefore, the 1962 codification, as construed by the Petitioner, does not involve any substantive change to the intent of the 1956 Act. Congress recognized that a reserve officer on active duty for more than four and one-half years has expressed his desire to remain on active duty beyond his initial obligation. Congress intended to compensate officers in this category, such as the Petitioner, who make a commitment to the military and then are forced to abandon their military career and return to civilian life. The Petitioner with four years, nine months and thirteen days of active service is no less entitled to or in need of readjustment pay than is an officer separated after five actual years of active duty. A construction of § 687(a) as urged by the Government and adopted by the Court of Appeals will permit the Government to continue to separate reserve officers from active duty just prior to the completion of five years of actual active service by the officer, thereby avoiding the expense of a readjustment payment. This practice is contrary to the intent of Congress.

The statute at issue here was intended to benefit reserve officers, such as the Petitioner, and as a reme-

dial statute it should be construed in favor of the Petitioner. See *Peyton* v. *Rowe,* 391 U.S. 54 (1968); *Helvering* v. *Bliss,* 293 U.S. 144 (1934). Since the statute, on its face, clearly makes the Petitioner eligible for a readjustment payment, the Petitioner's claim should not be denied due to an alleged deficiency of draftsmanship or due to an inconclusive statement in a committee report.

CONCLUSION

For the reasons stated the judgment of the Ninth Circuit should be reversed, and the case remanded with instructions to affirm the decision of the district court.

Respectfully submitted,

ARTHUR B. HANSON
ARTHUR A. BIRNEY
JOHN N. FENRICH, JR.
HANSON, O'BRIEN, BIRNEY,
STICKLE AND BUTLER
888 Seventeenth Street, N.W.
Washington, D.C. 20006
298-6161
Counsel for Petitioner

Of Counsel:

CHARLES A. SMITH
SMITH & HARPER
2210 North Roberts
Helena, Montana 59601

February 21, 1974

INDEX

CITATIONS

Cases:

Statutes—Continued

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-604

DONALD C. CASS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-5661

FRANCIS A. ADAMS, ET AL., PETITIONERS

v.

SECRETARY OF THE NAVY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the district court in *Cass* (*Cass* Pet. App. 1a-3a) is reported at 344 F. Supp. 550.

The opinion of the district court in *Adams* (*Adams* App. 22-24) is unreported. The court of appeals opinion in both cases (*Cass* Pet. App. 4a-8a; *Adams* App. 40-44) is reported at 483 F. 2d 220.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1973 (*Cass* App. 11). A petition for a writ of certiorari was filed in *Cass* on October 5, 1973, and in *Adams* on October 26, 1973. This Court granted both petitions on January 7, 1974 (*Cass* App. 12; *Adams* App. 45). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether reserve servicemen who are involuntarily released from active military duty after continuous active service of more than four and one-half, but less than five, years are entitled to readjustment pay under 10 U.S.C. 687(a).

STATUTE INVOLVED

10 U.S.C. 687(a) provides:

> Except for members covered by subsection (b), a member of a reserve component or a member of the Army or the Air Force without component who is released from active duty involuntarily, or because he was not accepted for an additional tour of active duty for which he volunteered after he had completed a tour of active duty, and who has completed, immediately before his

release, at least five years of continuous active duty, is entitled to a readjustment payment computed by multiplying his years of active service (other than in time of war or of national emergency declared by Congress after June 28, 1962), but not more than eighteen, by two months' basic pay of the grade in which he is serving at the time of his release. However, a member who is released from active duty because his performance of duty has fallen below standards prescribed by the Secretary concerned, or because his retention on active duty is not clearly consistent with the interests of national security, is entitled to a readjustment payment computed on the basis of one-half of one month's basic pay of the grade in which the member is serving at the time of his release from active duty. A person covered by this subsection may not be paid more than two years' basic pay of the grade in which he is serving at the time of his release or $15,000, whichever amount is the lesser. For the purposes of this subsection—

(1) a period of active duty is continuous if it is not interrupted by a break in service of more than 30 days;

(2) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded; and

(3) a period for which the member concerned has received readjustment pay under another provision of law may not be included.

Prior to codification in 1962 as 10 U.S.C. 687(a), the Act of July 9, 1956, 70 Stat. 517, as amended,

50 U.S.C. (1958 ed.) 1016(a), provided in pertinent part:

> A member of a reserve component who is involuntarily released from active duty after the enactment of this section and after having completed immediately prior to such release at least five years of continuous active duty, except for breaks in service of not more than thirty days, as either an officer, warrant officer, or enlisted person, is entitled to a lump-sum readjustment payment computed on the basis of one-half of one month's basic pay in the grade in which he is serving at the time of release from active duty for each year of active service ending at the close of the eighteenth year. For the purposes of computing the amount of readjustment payment (1) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded, and (2) any prior period for which severance pay has been received under any other provision of law shall be excluded. * * *

STATEMENT

The basic facts in these cases are undisputed. They are as follows:

Cass. As a member of the Army Reserves, Cass served on active Army duty from July 16, 1966, to April 26, 1971 (*Cass* App. 6). He had attained the rank of captain when he was honorably but involuntarily released from active duty after continuous service of 4 years, 9 months, and 13 days (*Cass* App. 6-7). After his request for readjustment pay of

$10,638 was denied by the Army, Cass commenced this action against the United States in the United States District Court for the District of Montana. For purposes of establishing jurisdiction under 28 U.S.C. 1346(a), Cass waived his claim to readjustment pay in excess of $10,000 (*Cass* App. 7).

The district court awarded Cass judgment in that amount. The court held that by virtue of the rounding provision in Section 687(a)(2), Cass qualified for readjustment pay even though he did not serve a full five years of continuous active duty (*Cass* Pet. App. 1a-3a).

Adams, Steneman, and *Youngquist.* Like Army Captain Cass, these three Marine Corps Reserve captains were notified that they would be honorably released from active duty after more than four and one-half, but less than five, years' service (*Adams* App. 25, 27, 29). Each had requested to remain on active duty beyond the expiration of his service commitment, but these requests were denied by the Commandant of the Marine Corps (*Adams* App. 25, 27, 29).

Prior to their release from active duty, Adams, Steneman, and Youngquist brought separate but similar actions in the United States District Court for the Central District of California against the Secretary of the Navy and the Commandant of the Marine Corps (*Adams* App. 10, 14, 18). Asserting jurisdiction under 28 U.S.C. 1331 and 1361, *inter alia,* the three officers sought a decree ordering the defendants (1) to modify the officers' military release

orders so as to authorize readjustment pay, and (2) to pay them readjustment pay. Upon the motions of the three officers, the district court preliminarily enjoined their involuntary release from active duty without readjustment pay, but subsequently vacated these injunctions as moot after the officers had been retained on active duty after completion of five full years of service (See *Adams* App. 23, 41). The district court then held that the three officers were entitled to readjustment pay based upon their service of more than four and one-half years, without including their additional service pursuant to the injunctions (*Adams* App. 23). Judgment was entered for the officers in the agreed amounts of $9,273 for Adams and Steneman and $10,065 for Youngquist (*Adams* App. 26, 28, 30).

The Court of Appeals Decision. On the government's appeals, the Court of Appeals for the Ninth Circuit reversed the decisions of both district courts (*Cass* Pet. App. 4a-8a; *Adams* App. 40-44). The appellate court held that the rounding provision of 10 U.S.C. 687(a) applies only for the purpose of computing the amount of readjustment pay, not for determining whether the minimum five-year period of service necessary for eligibility has been attained.[1]

---

[1] The court of appeals also rejected the contention of Adams, Steneman, and Youngquist that they qualified for readjustment pay by virtue of their service pursuant to the preliminary injunctions (*Adams* App. 43-44). This aspect of the decision below is not challenged in this Court.

ARGUMENT

A SERVICEMAN MUST COMPLETE AT LEAST FIVE FULL YEARS OF CONTINUOUS ACTIVE SERVICE TO BE ELIGIBLE FOR READJUSTMENT PAY UNDER 10 U.S.C. 687(a).

A. Introduction and Summary.

The single issue presented in these cases is whether the minimum period of active duty necessary for readjustment pay under 10 U.S.C. 687(a) is five years or four and one-half years. In its present form, Section 687(a) provides:

> * * * a member of a reserve component * * * who has completed, immediately before his release, at least five years of continuous active duty, is entitled to a readjustment payment computed by multiplying his years of active service * * * by two months' basic pay * * * For the purposes of this subsection—
>
> * * * *
>
> (2) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded * * *.

The government contends that the "rounding" provision in Subsection 2—under which service of six months or more is treated as service for a whole year and service of less than six months is disregarded—applies only in calculating the amount of readjustment pay, which is based upon the number of years of active service. It does not, however, control the basic determination whether the reservist is qualified

for any readjustment pay, to which he is not entitled unless he has completed "at least five years of continuous active duty." In other words, the government's position is that a reservist is not entitled to readjustment pay unless he has served at least five years on active duty but that, if he has so served, then the rounding provision comes into play in calculating the amount of his readjustment pay. For example, a reservist who served four years and eight months would not receive any readjustment pay; a reservist who served 13 years and four months would receive readjustment pay based upon 13 years of service; and a reservist who served 13 years and eight months would have his readjustment pay based upon 14 years of service.

The petitioners, on the other hand, interpret the rounding provision as covering entitlement to readjustment pay as well as its amount. In the hypothetical above, they argue that a reservist who served four years and eight months on active duty is entitled to readjustment pay based upon five years of service. In other words, they contend that when Congress specified that "at least five years of continuous active duty" was required before a reservist was entitled to readjustment pay, it actually meant only "at least four and one-half years."

Our submission is that the language of the statute shows that Congress intended the rounding provision to apply only in determining the amount of benefits but not eligibility for benefits, and that any possible doubt on that question is dispelled by the legislative

history of the statute. As originally enacted in 1956, the statute expressly provided that the rounding provision was applicable only "[f]or the purposes of computing the amount of readjustment payment," and the legislative history of that rounding provision shows that it was intended to cover only the calculation of the amount of pay. The present controversy arises because in the 1962 codification of the readjustment pay statute that phrase was changed to "[f]or the purposes of this subsection * * *." Both legislative committee reports on the codification state that no substantive change was intended, and the absence of congressional hearings or debates on the codification bill further confirms that, in making this change, Congress did not intend to reduce the eligibility criterion from five to four and one-half years' service. Although petitioners contend that the statute is so clear on its face that resort to legislative history is improper, we submit that there is sufficient ambiguity in the language that it is necessary to consider legislative history; in any event, the canon of statutory construction upon which petitioners rely cannot properly be applied in this case.

B. The "rounding" provision of Section 687(a) applies only in calculating the amount of readjustment pay, but not in determining whether a reservist is eligible for such pay.

The provision for readjustment pay for reservists in Section 687(a) contains two elements: (1) the standard for determining whether a reservist is eligible for such pay—that he must have completed "at

least five years of continuous active duty," and (2) a formula for calculating the amount of such pay, namely, "by multiplying his years of active service * * * by two months' basic pay." In the qualification portion of the statute, Congress itself fixed at five the minimum years of active service required before a reservist can receive any readjustment pay. In the computation section, however, Congress made the amount of such pay depend upon the number of years of actual service which, under the qualification section, necessarily had to be at least five.

In the light of this statutory plan, we submit that the rounding provision—under which service of more than six months is treated as service for a whole year, and service of less than six months is disregarded—applies only to computing the amount of benefits but not to determining eligibility therefor. Since Congress itself fixed the number of years of active service required before readjustment pay is available, the only reason for a rounding provision was to avoid ambiguity with respect to the basis upon which benefits were to be calculated for eligible reservists, *i.e.*, the number of a reservist's "years of active service." It is hardly likely that Congress, after specifying that "at least five years of continuous active duty" are required before a reservist can obtain readjustment pay, intended by the rounding provision to permit that requirement to be satisfied by four and one-half years of such duty. If Congress had intended the latter, it would have used that period instead of the five years it expressly provided.

Our interpretation of the statute is further confirmed by the fact that there are a number of other military pay provisions containing rounding provisions in which Congress, when it intended rounding to be used for determining eligibility, expressly so provided. The rounding provisions in the following statutes are limited to calculating the amount of payment, not determining eligibility: 10 U.S.C. 1167 (regular warrant officer severance pay); 10 U.S.C. 1405 (retired pay); 10 U.S.C. 3303, 3786, and 3796 (Army severance pay); 10 U.S.C. 6151, 6328, and 6404 (Navy and Marine Corps retired pay); 10 U.S.C. 8303, 8786, and 8796 (Air Force severance pay); 14 U.S.C. 286 (Coast Guard severance pay); 42 U.S.C. 212 (Public Health Service retired pay.). The only exception to this uniform scheme, so far as our research discloses, is 10 U.S.C. 6330,[2] dealing with transfers to the Navy and Marine Corps Fleet Reserve.

---

[2] The pertinent part of 10 U.S.C. 6330 provides:

> (b) An enlisted member of the Regular Navy or the Naval Reserve who has completed 20 or more years of active service in the armed forces may, at his request, be transferred to the Fleet Reserve. An enlisted member of the Regular Marine Corps or the Marine Corps Reserve who has completed 20 or more years of active service in the armed forces may, at his request, be transferred to the Fleet Marine Corps Reserve.
>
> (c) Each member who is transferred to the Fleet Reserve or the Fleet Marine Corps Reserve under this section is entitled when not on active duty, to retainer pay at the rate of 2½ percent of the basic pay that he

The language of that provision, in contrast to the language of the pay provisions cited above and the readjustment pay statute, reflects a deliberate choice to apply rounding in determining both eligibility and amount. Moreover, in contrast to the adjustment pay statute (see discussion in Point C, *infra*), there is no antecedent statute or legislative history indicating that Congress intended the rounding provision of 10 U.S.C. 6330 to apply only to computation of the amount of pay.

The conclusion that 10 U.S.C. 687(a) does not apply in determining eligibility for readjustment pay is further supported by the administrative interpretation of the agencies which administer the provision. All of the military services have uniformly applied the rounding provision only in computing payment, not in establishing the five years' service necessary for eligibility. See Department of Defense, Pay and Allowances Entitlements Manual, § 40411; Army Regulation 37-125, ¶ 1-40; Air Force Manual 177-105, ¶ 3-13(a); Secretary of the Navy Instruction 1900.7C, ¶ 3; Marine Corps Order 1900.1H, ¶ 7; Coast Guard Comptroller's Manual, ¶ 2B01157(A) and (E).[3] The administrative construction of 10

---

received at the time of transfer multiplied by the number of years of active service in the armed forces * * *

(d) For the purposes of subsections (b) and (c) a part of a year that is six months or more is counted as a whole year and a part of a year that is less than six months is disregarded. * * *

[3] These regulations are set forth in the Appendix to this brief. The DOD Pay and Allowances Entitlements Manual

U.S.C. 687(a) is entitled to great deference, *Udall* v. *Tallman*, 380 U.S. 1, 16, and "should be followed unless there are compelling indications that it is wrong," *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 381. Here, the administrative construction is consistent with both the language of the statute and, as we now show, its legislative history.[4]

---

and prior Army and Air Force regulations are also reproduced in the *Cass* Court of Appeals Record, pp. 40-48.

[4] Petitioners Adams, Steneman, and Youngquist contend that the rounding provision of Section 687(a)(2) should apply for determining both eligibility and amount because, they assert, Section 687(a)(3) excludes prior service for both purposes (Adams Brief, 13-16). The statute provides:

> For the purposes of this subsection—
>
> * * * *
>
> (3) a period for which the member concerned has received readjustment pay under another provision of law may not be included.

Before codification, the Act of June 28, 1962, 76 Stat. 120, expressly limited the applicability of this provision, as well as the rounding provision, "[f]or the purposes of computing the amount of the readjustment payment * * *." Similarly, the DOD Pay Manual § 40414(b) now excludes such prior service only for computing the amount of pay, not for determining eligibility. The question whether such prior service should be excluded for eligibility purposes would apparently arise only in the extraordinary case of a reservist who was involuntarily released and paid readjustment pay under the pre-1962 readjustment pay statute, but then was returned to active duty within thirty days and thereafter was involuntarily released again. Thus, the fact that Section 687(a)(3) is applied by the military only for computation, not eligibility, purposes supports the position that the rounding provision of Section 687(a)(2) should also apply only for computation purposes.

C. The legislative history of the Reservists' Readjustment Pay Act shows that Congress intended the rounding provision to apply only in calculating the amount and not in determining eligibility for such pay.

1. Readjustment pay was originally established by the Act of July 9, 1956, 70 Stat. 517 (*supra* at p. 4). The statute's primary purpose was to aid involuntarily released reservists in readjusting to civilian life.[5] In language identical to the present provi-

---

[5] This purpose was explained in H. Rep. No. 1960, 84th Cong., 2nd Sess. 2:

> As a result of the Korean hostilities and the related international tension of the last few years, a large number of reservists with wartime experience have been retained on active duty. These reservists have served faithfully and efficiently and, in many cases, have served 10 or more years. Many are approaching the age at which their usefulness to the military forces is less than that of younger reservists who are needed for current and future military service. These older reservists have been away from civilian life for an extended period and, in some cases, have been called away from civilian occupations on two occasions, during World War II and the Korean incident.
>
> The committee believes that they should be given an equitable payment upon involuntary release from active military duty to help them again readjust to civilian life.

A second purpose of the Act was:

> * * * to induce Reserve officers, by providing some measure of economic security, to remain voluntarily in the active service and thereby to reduce expensive personnel turnover and to increase the effectiveness of the armed services through the retention of competent and experienced officers.

S. Rep. No. 2288, 84th Cong., 2nd Sess. 2.

sion, the 1956 Act specified that "at least five years of continuous active duty" were necessary to establish eligibility for readjustment pay. Under that statute, as under the present one, the amount of the readjustment pay was also based upon the number of years of active duty. There was no ambiguity created by the original language relating to rounding off, however, because the 1956 Act provided, "*For the purposes of computing the amount of readjustment payment* (1) a part of a year that is six months or more is counted as a whole year * * *." 70 Stat. 517 (Emphasis added).[4]

Indeed, the italicized phrase was added at the suggestion of the Comptroller General to preclude any possible confusion over whether a full five years' service was required for eligibility. As passed by the House, the rounding provision in the 1956 bill was similar to the present one: "*For the purposes of this subsection*, a part of a year that is 6 months or more is counted as a whole year, and a part of a year that is less than 6 months is disregarded." H.R. 9952, 84th Cong., 2nd Sess., reprinted at 102 Cong. Rec.

---

[4] The *amicus* argues that because the present statute provides, "For the *purposes* of this subsection * * *" (emphasis added), the rounding provision should be applied for determining both eligibility and amount (O'Meara Brief, 20). The plural "purposes," in the present statute, however, appears merely to have been carried forward from the 1956 provision, which expressly limited the use of rounding to calculating the amount of pay. Therefore, the use of the word "purposes" in the present statute does not support the contention that the rounding provision applies for eligibility purposes.

10120 (Emphasis added). Representative Brooks, the bill's sponsor, explained to the House that this rounding provision was intended to apply only for the purpose of computing the amount of readjustment pay, not of determining eligibility (102 Cong. Rec. 10118-10119):

> Rep. Brooks: At this time I would like to explain the provisions of the bill. The readjustment payment authorized by this bill would be computed on the basis of one-half of 1 month's basic pay in the grade the reservist is serving at the time of release from active duty, for each year of active service up to and including the 18th year. A part of a year, that is 6 months or more, will be counted as a whole year, and a part of a year that is less than 6 months would be disregarded. * * *
>
> Under the provisions of the bill, a reservist must have served 5 years of continuous active duty before he could qualify. * * *
>
> Rep. Gross: The minimum, then, is 5 years; is that correct?
>
> Rep. Brooks: That is correct. The reason for the 5 years, of course, is that a 3-year enlistment would require a reenlistment, or, if you put it this way, a man who is in for 4 years will have to reenlist for an extended period. After he completes the first enlistment I think he intends to stay in the service and this encourages him to stay in the service as long as the service needs him.

The Senate amended the rounding provision to specify that it applied only "[f]or the purposes of

computing the amount of readjustment payment * * *." 102 Cong. Rec. 11333-11334. This clarification had been suggested by the Comptroller General in a letter to the Chairman of the Senate Committee on Armed Services, which stated:

> Although the language of subsection (a) of the bill seems to indicate that a minimum of 5 years' continuous active duty as an officer or warrant officer is necessary to qualify for a readjustment payment, the last sentence of that subsection appears to reduce the minimum qualifying service to 4 years and 6 months. Presumably the provision authorizing the counting of 6 months or more as a whole year was intended to apply only for the purpose of computing the amount of a lump-sum payment and not the quantum of qualifying service. If so, the language should be clarified, perhaps somewhat as follows:
>
> > "For the purpose of computing the amount of the readjustment payment a fractional part of a year amounting to 6 months [or 183 days] or more shall be counted as a whole year and a shorter period shall be disregarded."

S. Rep. No. 2288, 84th Cong., 2nd Sess. 11. The House then concurred in the bill as amended by the Senate. 102 Cong. Rec. 11503-11504.

Thus, the original 1956 statute unambiguously required a full five years of active service to establish eligibility for readjustment pay.

Although the readjustment pay provision was amended in 1958 (72 Stat. 1266) and 1959 (73 Stat.

596), the eligibility criterion ("at least five years") and the rounding provision continued unchanged until 1962. In that year Congress enacted two bills pertaining to readjustment pay. First, in the Act of June 28, 1962, the amount of the readjustment pay was increased. 76 Stat. 120. This Act continued in force without substantial change the rounding provision providing that six months would be rounded to the next full year only "[f]or the purposes of computing the amount of the readjustment payment" (76 Stat. 120), not for determining eligibility.

Less than three months later, Congress amended Title 10 of the United States Code to codify recent military laws. 76 Stat. 506. As part of that codification, the readjustment pay provision, 50 U.S.C. 1016(a) (1958 ed.) as amended, was repealed and reenacted as 10 U.S.C. 687(a). 76 Stat. 507, 526. It was this Act which changed the language of the rounding provision to its present form: "For the purposes of this subsection * * * a part of a year that is six months or more is counted as a whole year * * *." 76 Stat. 507.

The legislative reports accompanying the bill state that it was intended to make no substantive changes.[7] Thus, the Senate report states:

---

[7] Significantly, the 1962 codification bill was assigned to the Senate and House Judiciary Committees. The bill which Congress enacted less than three months earlier to make substantive changes in the readjustment pay provision had been reported by the Senate and House Armed Services Committees. See S. Rep. No. 1096, 87th Cong., 1st Sess.; H. Rep. No. 1007, 87th Cong., 1st Sess.

> This bill, as amended, is not intended to make any substantive change in existing law. Its purpose is to bring up to date title 10 of the United States Code, by incorporating the provisions of a number of public laws that were passed while the bill to enact title 10 into law was still pending in the Congress, and to transfer to title 10, provisions now in other parts of the code.
>
> * * * *
>
> Some changes in style and form have been made to conform the provisions to the style and form of title 10 as it now exists, but these changes do not affect the substance of any of the laws dealt with.

S. Rep. No. 1876, 87th Cong., 2nd Sess. 6. Accord, H. Rep. No. 1401, 87th Cong., 2nd Sess. 1. Moreover, while these legislative reports purport to list all changes made in the statutory language, there is no mention at all of the deletion of the phrase "computing the amount of readjustment payment." [*]

A reduction in the period of active duty required to qualify for readjustment pay from five to four and one-half years would have been a significant "change in existing law."

Relying upon *Schmid* v. *United States*, 436 F. 2d 987, 990-991 (Ct. Cls.), certiorari denied, 404 U.S. 951, petitioner Cass contends that in the 1962 Act, Congress intentionally reduced the five-year eligibility criterion to four and one-half years by restoring

---

[*] Paradoxically, the reports state, "The words 'lump sum' and 'For the purposes of' are omitted as surplusage." S. Rep. No. 1876, *supra* at p. 7; H. Rep. No. 1401, *supra* at p. A1. In fact, however, "For the purposes of" was not omitted.

the original rounding provision from the 1956 readjustment pay bill passed by the House (Cass Brief 18-19). This argument fails for three reasons. First, as shown above at p. 19, both legislative reports accompanying the 1962 Act indicate that no substantive change was intended. Second, as noted at pp. 16-17 *supra*, the 1956 House bill itself was not intended to permit readjustment pay after only four and one-half years of service, and the Comptroller General suggested the amended rounding provision merely to clarify, not change, the five-year requirement. Finally, the 1962 codification was enacted without debate in either the House or the Senate. There were no legislative hearings, or even inquiries, as to whether the eligibility requirement should be reduced. Yet to apply the rounding provision for eligibility purposes would create readjustment pay entitlements for a substantial number of previously ineligible servicemen.[9] As Judge Nichols aptly stated in his dissenting opinion in *Schmid* v. *United States*, *supra*, 436 F. 2d at 992:

> That the change was inadvertent is strongly supported by the reports * * *. They set forth the statutory sources of § 687, purport to show each change of language, and to explain in each instance the lack of any substantive change. Yet

[9] At the time of filing of the government's petition for a writ of certiorari in *Schmid* v. *United States*, *supra*, we were informed by the Services that they estimated that reducing the readjustment pay eligibility requirement to four and a half years would increase the Government's potential liability by more than $12,000,000.

> the reduction of the qualifying period from five to four years six months is nowhere mentioned. I believe that the Congress, had it consciously considered reducing the qualifying period as alleged, would have held hearings and received reports and testimony. This would have been a matter of importance to the GAO, which commented on the 1956 legislation, as well as to executive agencies, and to veteran's organizations. Apparently nothing of the kind occurred.

2. Petitioners attempt to avoid the force of this legislative history by arguing that the statute is clear on its face, and that resort to legislative history is therefore inappropriate. As the previous discussion indicates (*supra*, pp. 9-10), however, there is sufficient uncertainty about the meaning of the statute—whether the phrase "For the purpose of this subsection" in the rounding provision covers only the calculation of the amount of benefits, but not the determination of eligibility therefor—to make it appropriate to consider the intention of Congress as reflected in the history of the legislation. Indeed, the need for considering such history is underlined by the disagreement between the court of appeals in this case, which found that statute "clear on its face" in requiring five years' service for eligibility (*Adams* App. 43), and the Court of Claims in *Schmid* v. *United States*, *supra*, 436 F. 2d at 989, which found the statute "clear and unambiguous on its face" in requiring only four and one-half years.

In any event, as stated in *United States* v. *American Trucking Assns.*, 310 U.S. 534, 543-544 (foot-

notes omitted), "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" Similarly, in *Lynch* v. *Overholser*, 369 U.S. 705, 710, this Court emphasized:

> The decisions of this Court have repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute * * * for "literalness may strangle meaning," *Utah Junk Co.* v. *Porter*, 328 U.S. 39, 44.

The utilization of legislative history is particularly appropriate in interpreting codified statutes, because a change in statutory language resulting from a codification does not ordinarily alter the meaning of the statute even where a literal construction of the new language could result in a substantive change. See *United States* v. *Cook*, 384 U.S. 257; *City of Greenwood* v. *Peacock*, 384 U.S. 808; *Fourco Glass Co.* v. *Transmirra Corp.*, 353 U.S. 222; 1A J. Sutherland, *Statutes and Statutory Construction*, § 28.10 (4th ed.).[10] In this case, as in *Cook*, *Greenwood*, and

[10] The two decisions of this Court chiefly relied upon by petitioners and the *amicus* do not support petitioners' position. While both *Continental Casualty Co.* v. *United States*, 314 U.S. 527, and *United States* v. *Bowen*, 100 U.S. 508, involved construction of revised statutes which had altered the language of prior acts, in neither case was this Court's decision based solely on the statutory changes. In *Continental Casualty* this Court held that the result reached was compelled by the purpose of the legislation and in *Bowen*, which involved a statute governing the assignment of military pensions to the

Fourco Glass, the legislative history of the codification shows that no substantive change was intended (See pp. 18-19, *infra*). To refuse to consider the legislative history in these circumstances would contravene the guiding principle of statutory interpretation: that statutes are to be construed in the way that best effectuates the purpose of the legislature in enacting them. See, *e.g.*, *Harrison* v. *Northern Trust Co.*, 317 U.S. 476, 479.

Soldiers Home by residents of the Home, this Court reviewed the history of the establishment of the Soldiers Home in reaching its decision.

To the extent that the opinions in *Continental Casualty* and *Bowen* contain language which suggests that a court cannot resort to aids in construction of codified statutes, such language is contrary to this Court's recent decisions and can no longer be deemed controlling. See, *e.g.*, *City of Greenwood* v. *Peacock*, *supra*; *Fourco Glass Co.* v. *Transmirra Corp.*, *supra*.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

IRVING JAFFE,
Acting Assistant Attorney General.

WILLIAM L. PATTON,
Assistant to the Solicitor General.

ROBERT E. KOPP,
ANTHONY J. STEINMEYER,
Attorneys.

APRIL 1974.

APPENDIX

The Department of Defense Pay and Allowances Entitlements Manual, Part 4, Chapter 4, Section B provides:

§ 40411:

> Reserve members who have completed at least five years of continuous active duty immediately before involuntary separation are entitled to readjustment pay if they are not qualified for retirement. This also applies to members of the Army or Air Force without specification of component (temporary). Conditions of entitlement are in Table 4-4-6 and Table 4-4-7.

§ 40414:

> To compute years' active service to determine amount of readjustment pay due, follow these rules:
>
> a. Fractions of Year. Count six months or more as a whole year, and disregard any part less than six months.
>
> b. Period for Which Separation Pay Received. Do not count any prior service for which any type of severance pay, separation payment, or release from duty payment has been made.

Army Regulation 37-125, ¶ 1-40, provides:

> Entitlement to readjustment pay will be determined in accordance with the provisions of Part Four, Chapter 4, Section B, DODPM [DOD Pay Manual].

Air Force Manual 177-105, ¶ 3-13(a) provides:

> When notice is received that a member is to be separated involuntarily, determine entitlement under DODPM, part four, chap 4, sec B. If he is entitled, immediately counsel member about his option to elect to receive or to waive his entitlement to readjustment pay. In either case have him complete and sign AF Form 1481, "Certification of Election to Accept or Waive Readjustment Payment," in original and two copies. Reproduce this form locally (fig 3-7). Verify all information on the form from:
>
> (1) Information furnished by the Department of the Air Force directing the involuntary separation.
>
> (2) Prior separation documents obtained from the member.
>
> (3) Financial data file.

Secretary of the Navy Instruction 1900.7C, ¶ 3 provides:

> Reference (a) [10 U.S.C. 687] authorizes readjustment payments for certain Reserve personnel who are "involuntarily released from active duty" and who meet other prescribed criteria (ref. (b) [DOD Pay Manual, Pt. 4, Ch. 4, Sec. B]).

Marine Corps Order 1900.1H, ¶ 7 provides:

> Reserve officers who serve on continuous active duty for a minimum of 5 years are entitled to lump-sum readjustment payments upon involuntary release from active duty as outlined in paragraphs 40411-40417 of reference (f) [DOD Pay Manual].

Coast Guard Comptroller's Manual provides:

¶ 2B01157(A):

Under the provisions of 10 USC 687, a member of the Coast Guard reserve who is involuntarily released from active duty on or after 29 June 1962 is entitled to a lump sum readjustment payment, provided he has completed *at least five years* of continuous active duty immediately prior to such release.

¶ 2B01157(E):

Compute the number of years of active service in determining the multiplier as follows:

Count a part of a year that is six months or more as a whole year. Disregard a part of a year that is less than six months.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 536639 222

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-604

DONALD C. CASS, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

ARTHUR B. HANSON
ARTHUR A. BIRNEY
JOHN N. FENRICH, JR.
HANSON, O'BRIEN, BIRNEY
STICKLE AND BUTLER
888 Seventeenth Street, N.W.
Washington, D.C. 20006
298-6161
Counsel for Petitioner

Of Counsel:

CHARLES A. SMITH
SMITH & HARPER
2210 North Roberts
Helena, Montana 59601

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

INDEX OF CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-604

DONALD C. CASS, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF FOR PETITIONER

ARGUMENT

Neither Reference to Other Statutes or to Administrative Interpretations Show That Petitioner's Construction of the Statute Is Not Correct

In order to demonstrate that the rounding provision of 10 U.S.C. § 687(a) does not apply to the eligibility requirement the government cites several statutes which relate to a number of other military pay provisions. (Resp. Brief at 11). However, these provisions lend support to the Petitioner's view of § 687(a).

Except for 42 U.S.C. § 212 and 10 U.S.C. § 6330, none of the statutes cited by the government contain eligibility provisions within the statute itself. Therefore, as to those statutes, no question arises as to whether the rounding provision applies to the determination of eligibility. As to 42 U.S.C. § 212, the rounding provision expressly applies to the computation of the pay and not to the eligibility provisions, but 10 U.S.C. § 6330 (Resp. Brief n.2) expressly applies the rounding provision to the eligibility requirement as well as to the computation of the payment. Therefore, it is apparent that Congress has not adopted any uniform scheme as to the applicability of a rounding provision in military pay statutes.

The government asserts that it is highly unlikely that Congress would specify a period of "at least five years of continuous active duty" as an eligibility requirement in 10 U.S.C. § 687(a) and then reduce this period to four and one-half years by virtue of the rounding provision. However, an examination of 10 U.S.C. § 6330 shows that Congress specified a completion period of "20 or more years of active service" for eligibility under that statute, yet the later rounding provision in the statute was made expressly applicable to the eligibility requirement, thereby reducing it to nineteen and one-half years.

The eligibility requirement and the computation formula in 10 U.S.C. § 6330 are set forth in subsections (b) and (c) respectively, and the prefatory phrase to the rounding provision states "For the purposes of subsections (b) and (c) . . . ." The only difference in the rounding provision of § 687(a) is that the prefatory phrase reads "For the purposes of this subsection . . . ." The prefatory language of § 6330 could

not be used in § 687(a) because both the eligibility requirement and the computation procedure are set forth in one subsection. Nevertheless, it is clear that the language of the rounding provision of § 687(a) manifests a congressional intent which is identical to the congressional intent expressed by the rounding provision of § 6330.

The government's reliance upon administrative interpretation of 10 U.S.C. § 687(a) in support of its construction of the statute is misplaced. The courts are the final authorities on issues of statutory construction and a court should not rubber stamp an administrative construction which is contrary to the plain meaning of a statute or contrary to the congressional intent underlying the statute. *Volkswagenwerk v. FMC,* 390 U.S. 261 (1968). Here, the administrative interpretation is contrary to the plain meaning of the statute. Additionally, the denial of readjustment pay to those such as the Petitioner frustrates the congressional policy underlying readjustment pay. (See Pet. Brief at 19-20).

The cases cited by the government, wherein this Court gave deference to administrative construction, are distinguishable from the case now before the Court. In *Udall v. Tallman,* 380 U.S. 1 (1965), the Court was not required to construe a statute, but rather an executive order and an Interior Department regulation. In this situation, the Court was willing to defer to an administrative construction of its administrative order. In *Red Lion v. F.C.C.,* 395 U.S. 367 (1969), the Court held that the Federal Communications Commission's application of the "fairness doctrine" was authorized under the Communications Act. The Court noted that the F.C.C. had consistently construed the

Act to confer this authority under the "public interest" language of the Act. Congress had acquiesced in this construction for thirty years and Congress ultimately had expressly accepted the F.C.C. construction. Therefore, the cases cited by the government are not applicable to this case.

The Government Has Not Cited Any Authority Which Dictates That This Court Should Cast Aside the Plain Meaning of 10 U.S.C. § 687(a)

The government cites several cases in its brief in support of its effort to have this Court rely upon the legislative history of 10 U.S.C. § 687(a) rather than the plain meaning of that section. The cited cases are distinguishable from this case and therefore are not applicable to this case.

In *United States v. American Trucking Ass'ns.*, 310 U.S. 534 (1940) this Court did recognize that where the application of the plain meaning of a statute produces "unreasonable" results "plainly at variance with the policy of the legislation as a whole" then the Court may disregard the plain meaning of the statute. 310 U.S. at 543. However, the government has made no attempt to demonstrate to this Court that the payment of readjustment pay to those such as the Petitioner herein would be plainly contrary to the policy behind readjustment pay.[1] On the other hand, Peti-

[1] The government has represented that a reduction of the eligibility requirement to four and one-half years would create a potential liability to the government of $12,000,000. There is absolutely no evidentiary basis for this representation in the record of this case, in *Schmid* v. *United States*, 436 F.2d 987 (Ct. Cl. 1971), *cert. denied*, 404 U.S. 951, or any other readjustment pay case that Petitioner is aware of. This Court should not let this unsupported representation influence its construction of § 687(a). Additionally, any potential

tione
justi
the
that
The
port
Cou
Cou
utor
liabi
tari
tion
The
liabi
stat
ernr
rese
cont
esca
mea
not
pote

er has demonstrated that the policy behind readment pay is to encourage reservists to remain in service beyond four years with the understanding they will be compensated if involuntarily released. refore, the *American Trucking* case does not sup- the government's argument.[2] Moreover, the rt noted in that case:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." 310 U.S. at 543.

he Petitioner's brief cited two decisions of this rt which state that where the meaning of a statry codification is clear a court should not endeavor

---

lity has been created by the government's policy of involuny releasing reserves from active duty just prior to the completof five years so that a readjustment payment could be avoided. re is no evidence that the government would have incurred any lity if the government had followed the plain meaning of the ute since the 1962 codification. Rather, it is likely that the govment would have instituted a policy of involuntarily releasing rves just prior to the completion of four and one-half years of inuous service. The government should not be permitted to pe the consequences of its voluntary failure to follow the plain ning of § 687 (a) by arguing to this Court that Congress could have intended to have the government voluntarily incur a ential liability of $12,000,000.

[2] This Court's opinion in *Lynch* v. *Overholser*, 369 U.S. 705 (1962) is also inapplicable to the case at bar because the Court went beyond the plain meaning of the statute at issue in order to free the statute from constitutional doubts. 369 U.S. at 711. The portion of *Utah Junk Co.* v. *Porter*, 328 U.S. 39 (1946), quoted in the government's quotation from *Lynch*, was taken out of context. This Court said in *Utah Junk*:

> "All construction is the ascertainment of meaning. And literalness may strangle meaning. *But in construing a definite procedural provision we do well to stick close to the text and not import argumentative qualifications from broad, unexpressed claims of policy.*" 328 U.S. at 44. (emphasis supplied).

to determine whether the codification changed the meaning of the former statute. (Pet. Brief at 15-16). The government asserts that in both *Continental Casualty Co. v. United States,* 314 U.S. 527 (1942), and *United States v. Bowen,* 100 U.S. 508 (1880), this Court's decision to follow the plain meaning of the statute at issue was based upon the Court's view as to the purpose of the original legislation. The government's assertion is erroneous.

In *Continental Casualty, supra,* this Court expressly stated:

> "Hence, not for reasons of policy, but *because of the language of the statute,* we conclude that Congress has chosen the former." 314 U.S. at 531 (emphasis supplied).

In *Bowen, supra,* this Court followed the plain meaning of the statute at issue for the following reason:

> "[W]e are of the opinion that the reasonable force of the language used in that section, taken in connection with the whole of the chapter devoted to that subject, and the accepted canons of interpretation, leave room for no other construction than that [plain meaning] . . . ." 100 U.S. at 513.

Clearly, this Court relied only on the language of the statutes as a basis for its decisions in *Continental Casualty, supra,* and *Bowen, supra.*

The government argues that *Continental Casualty, supra,* and *Bowen, supra,* have been overruled by more recent cases to the extent that the former cases suggest that a court should not resort to extrinsic aids in construing codified statutes. (Resp. Brief n.10 citing *City of Greenwood v. Peacock,* 384 U.S. 808;

Fourco Glass Co. v. Transmirra Prod. Corp., 353 U.S. 222). The Court of Appeals for the Fifth Circuit considered this question in *Barbee v. United States*, 392 F.2d 532 (5th Cir. 1968) and concluded:

> "When the meaning of a revised statute has been clear, courts have refused to consider any conflicts in revisionary history. *United States v. Bowen* . . . *Continental Casualty Co. v. United States* . . . On the other hand, when the meaning of a revised statute has been subject to doubt, courts have relied heavily on the revisors for guides to interpretation . . . *Fourco Glass Co. v. Transmirra Products Corp.* . . . *City of Greenwood, Mississippi v. Peacock.* [Citations omitted].
>
> * * *
>
> *We have found no conflict in the substance of the above cases.*" 392 F.2d at 535 n.4 (emphasis supplied).

The Fifth Circuit has recognized that this Court's rationale in *Continental Casualty, supra,* and *Bowen, supra,* applies when the meaning of a revised or codified statute is clear on its face. Since the meaning of 10 U.S.C. § 687(a) is clear on its face, the cases cited by the government are inapplicable. In accordance with its decisions, this Court should not resort to legislative history in deciding this case.

The Government's Theory That Congress Made an Inadvertent Mistake Cannot Be Supported to the Extent That the Plain Meaning of 10 U.S.C. § 687(a) Should Be Set Aside

The thrust of the government's argument is that Congress made an inadvertent mistake when it codified the readjustment pay statute into 10 U.S.C. § 687(a). This argument is based upon the theory that the language of § 687(a) does not express the actual intent of Congress, which, according to the government, was to

apply the rounding provision only to the computation of the payment.

It is significant that in reviewing the legislative history of the readjustment pay statutes the government argues that the House also made an inadvertent mistake in its 1956 readjustment pay bill since the language of the House bill, according to the government, did not express the actual intent of the House. The government urges that during the House debate of the 1956 bill Congressman Brooks explained that the rounding provision was not intended to be applied for the purpose of determining eligibility. According to the government's theory, the Comptroller General informed the Senate as to the inadvertent mistake on the part of the House and the Senate thereafter amended the rounding provision expressly to limit its applicability to the computation of the amount of the payment. (Resp. Brief at 14-17).

Petitioner submits that the government's view as to the intent of the House in 1956 is no more conclusive than its view as to the intent of Congress in 1962. An examination of the floor debate on the 1956 House bill reveals no statement which is inconsistent with the intent of the House to apply the rounding provision to the eligibility requirement. 102 Cong. Rec. 10117-10120. Although Representative Brooks made several references to a minimum requirement of five years of continuous active duty, these statements are not inconsistent with the fact that this minimum requirement could be fulfilled after four and one-half years by virtue of the rounding provision. For example, the rounding provision of 10 U.S.C. § 6330 is applicable to the eligibility requirement without being in-

consistent with the number of years for eligibility expressly set forth in § 6330(b).

The Comptroller General's letter to the Chairman of the Senate Committee on Armed Services stated that "presumably" the rounding provision of the 1956 House Bill was contrary to the intent of the House insofar as the eligibility requirement was concerned. (See Pet. Brief at 18). It is clear that the Comptroller General did not actually know what the intent of the House was. Although the Senate's amendment to the rounding provision was contained in the enacted statute, this does not negate the possibility that the House originally intended to apply the rounding provision to the eligibility requirement but later acquiesced to the Senate amendment. This view is supported by the statement of Representative Brooks to the effect that the intent of the House readjustment pay bill was to induce reservists to stay in the service beyond an initial four year period. (See Pet. Brief at 20).

Petitioner therefore submits that the Court of Claims correctly found in *Schmid, supra,* that the restoration of the language of the original House bill by virtue of the 1962 codification is a strong indication that in 1962 Congress intentionally adopted the language and intent of the 1956 House bill which clearly made the rounding provision applicable to the eligibility requirement. (See Pet. Brief at 19). This view is much more probable than the government's theory that Congressional bodies made inadvertent mistakes on two different occasions. The government is asking this Court to set aside the plain meaning of 10 U.S.C. § 687 (a) on the basis that the 1962 Congress coincidentally and mistakenly adopted the exact same rounding provision which the House mistakenly adopted in 1956.

Such a theory is too tenuous to justify a rewriting of § 687(a) by this Court.

The government conceded at the oral argument of this case that it has made no effort to overcome the *Schmid* decision by requesting legislation from Congress, although it has been over two years since this Court denied *certiorari* in *Schmid*. Congress has taken no action in this regard on its own initiative. The government now seeks to have this Court undo what the government claims is a mistake on the part of Congress. In view of the inconclusive legislative history supporting the government's construction of the statute, this Court should hold that the statute means what it says and that the Petitioner is entitled to readjustment pay.

CONCLUSION

For the reasons stated the judgment of the Ninth Circuit should be reversed, and the case remanded with instructions to affirm the decision of the district court.

Respectfully submitted,

ARTHUR B. HANSON
ARTHUR A. BIRNEY
JOHN N. FENRICH, JR.
HANSON, O'BRIEN, BIRNEY
STICKLE AND BUTLER
888 Seventeenth Street, N.W.
Washington, D.C. 20006
298-6161
Counsel for Petitioner

Of Counsel:

CHARLES A. SMITH
SMITH & HARPER
2210 North Roberts
Helena, Montana 59601

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-5661

FRANCIS A. ADAMS, ROBERT J. STENEMAN; and MICHAEL W. YOUNGQUIST,

Petitioners,

v.

THE SECRETARY OF THE NAVY and COMMANDANT OF THE MARINE CORPS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' BRIEF

WILLIAM A. DOUGHERTY
PAUL R. CONSTANTINO
17291 Irvine Boulevard
Tustin, California 92680
Telephone: (714) 838-7222

Counsel for Petitioners

Washington, D.C. • CLB PUBLISHERS • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-5661

FRANCIS A. ADAMS, ROBERT J. STENEMAN; and MICHAEL W. YOUNGQUIST,

Petitioners,

v.

THE SECRETARY OF THE NAVY and COMMANDANT OF THE MARINE CORPS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' BRIEF

ISSUE PRESENTED

Whether a member of an armed services reserve component who serves in excess of four years and six months but less than five years of continuous active duty prior to his involuntary release from said active duty is entitled to readjustment payment under Title 10 United States Code §687(a).

Stated in another manner, the sole issue posed by these consolidated cases is whether the definition of a "year" which is contained in 10 U.S.C. §687(a)(2) is to be

applied when computing "eligibility" for readjustment pay as well as when computing the "quantum" of readjustment pay for those servicemen eligible. Accordingly, the function of the so-called "rounding provision" found in 10 U.S.C. §687(a)(2), when viewed in the larger context of subsection 887(a) is central to this Court's inquiry.

STATEMENT OF THE CASE

The petitioners, three Marine Corps Reserve officers, then serving on active duty as Naval Aviators with the United States Marine Corps, brought actions in the district court seeking an order requiring the defendants, The Secretary of the Navy and The Commandant of the Marine Corps, to amend the military orders releasing them from active duty so as to authorize payment of readjustment pay pursuant to 10 U.S.C. §687(a). The district court held that the officers were entitled to readjustment pay and entered judgment in their favor. The Government appealed all three judgments. The cases were consolidated for purposes of appeal. The judgments were reversed on appeal. The servicemen then petitioned for a writ of certiorari to the Court of Appeals, Ninth Circuit and their petition was granted by this Court.

The facts in all three cases were stipulated at time of trial. Adams, Steneman and Youngquist were Marine Corps Reserve Captains serving on active duty. Each requested that his active duty service be extended, but these requests were not approved by the Commandant of the Marine Corps. The three aviators were ordered released from active duty under honorable circumstances. Each officer was to be released after continuous active service of more than four years and six months but less than five full years. The orders releasing them from active

duty specified that they were not to receive readjustment pay.[1]

Prior to the release dates specified in their orders, the three servicemen commenced actions in district court. They sought orders requiring The Secretary to modify their release orders so as to specify entitlement to readjustment pay and requiring The Secretary to pay them readjustment pay under 10 U.S.C. §687. Following trial on the stipulated facts, the district court held that the servicemen were entitled to readjustment pay based upon the fact that they had completed in excess of four years and six months of continuous active duty. Judgments were entered on October 31, 1972, ordering The Secretary to pay readjustment pay to the servicemen upon their involuntary release from active duty. The amounts ordered to be paid as stipulated between the parties were $9,273.00 for Captains Adams and Steneman and $10,065.00 for Captain Youngquist.

On November 3, 1972, the Government filed notices of appeal from these judgments and on December 1, 1972, the court of appeals stayed the judgments pending appeal. The cases were consolidated for purposes of appeal and on August 1, 1973, the court of appeals reversed, holding that five full years of continuous active duty was necessary for entitlement to readjustment pay.

The servicemen petitioned this Court for a writ of certiorari to the court of appeals and on January 7, 1974, this Court granted the petition.

---

[1] Each of the petitioners served over five full years of continuous active duty prior to his actual release, but this was accomplished only by means of injunctive relief granted by the district court barring their involuntary release without readjustment pay pending trial on the merits.

ARGUMENT

I.

THE ROUNDING PROVISION OF 10 U.S.C. §687(a) APPLIES EQUALLY TO BOTH THE ELIGIBILITY REQUIREMENTS AND TO THE METHOD OF COMPUTATION.

A. The Statute Is Clear on Its Face. The Courts May Not Resort to Statutory Construction.

The decision of the court of appeal is erroneous and should be reversed due to a fundamental error. That court found the statute to be ambiguous due to an "inconsistency" between §687(a) and §687(a)(2) in the meaning of the word "year". Having found this "inconsistency", the court then proceeded to search the legislative history of the statute for the intent. The mistake made was that the court looked at the body of §687(a) by itself. Then it isolated §687(a)(2) and read it separately. The obvious result was to find differences between those two parts of the whole—hence, an ambiguity.

Why did the court of appeals not read the statute in its entirety, as this Court has admonished,[2] in order to determine whether it contained an internal inconsistency? The statute provides in pertinent part:

> "§687(a) . . . , a member of reserve component . . . who is released from active duty involuntarily . . . who has completed, immediately before release, at least five years of continuous active duty, is entitled to a readjustment payment computed by multiplying his years of active service . . . by two months' basic pay of the grade in which he is serving at the time of his release . . . For the purposes of this subsection—

[2] See *Rice v. Minnesota & N.W.R. Co.*, 66 U.S. 358, 1 Black 358, 17L.Ed. 147 (1861).

"(1) a period of active duty is continuous if it is not interrupted by a break in service of more than 30 days;

"(2) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded . . ."

Even a cursory reading of subsection 687(a) reveals that it covers entitlement to, as well as computation of, readjustment pay. The introductory phrase "For the purposes of *this subsection* . . .", which connects subsections (1), (2) and (3) to the body of §687(a), most certainly refers to subsection 687(a). Thus, the prefatory phrase and (2) might just as well be read "for the purposes of entitlement to and computation of readjustment pay—(2) a part of a year that is six months or more is counted as a whole year, and a part of the year that is less than six months is disregarded . . .". To deny this interpretation is to deny the plain meaning of words. Accordingly, in determining petitioners' eligibility for readjustment pay as well as computing the amounts thereof, in each case the fraction of a year which is six months plus is counted as a whole year, bringing each up to a total of five years of active duty for the purposes of 10 U.S.C. §687.

It should be noted that §687(a)(1), which, of course, also follows the same prefatory phrase, defines the word "continuous" found in the body of §687(a). In other words, it defines the general term "continuous" in a most specific way. This is the very same function that §687(a)(2) performs in connection with the word "year". It provides a specific, statutory definition for a general term. Therefore, any consideration of the eligibility requirement of five years without consideration of the definition of "year" found within the same statute, does violence to it.

The Court in *Schmid v. United States*, 436 F.2d 987 (Ct. Cls.), cert. denied, 404 U.S. 951 (1971), the only previous holding interpreting the requirements of 10 U.S.C. §687, recognized this fact when it viewed the statute as the sum of its parts and not in a disjointed manner and stated as follows:

> "We find that the section is clear and unambiguous on its face and is susceptible on its face, of only one interpretation . . . The clear indication is that, in determining eligibility for readjustment pay and in computing the amount thereof, a period of six months or more is counted as a whole year. 436 F.2d 987, 989."

Accordingly, no ambiguity existing on the face of the statute, no reason for statutory construction is present. This Court and others have reiterated this maxim in many ways.

> "Where the language of a statute is transparent and its meaning is clear there is no room for the office of construction, since there should be no construction where there is nothing to construe." *Lewis v. U.S.*, 92 U.S. 618, 23 L.Ed. 513 (1875).
>
> "Rules of statutory construction have no place, except in the domain of ambiguity and may not be used to create, but only to remove, doubt." *Russell Motor Car Co. v. U.S.*, 43 S.Ct. 428, 261 U.S. 514, 67 L.Ed. 778; *Freygang v. U.S.*, 43 S.Ct. 428, 261 U.S. 514, 67 L.Ed. 778 (1923).
>
> "Court cannot construe statutory language so plain as to need no construction, or refer to legislative committee reports where there can be no doubt of the meaning of the words used." *Helvering v. City Bank Farmers Trust Co.*, 56 S.Ct. 70, 296 U.S. 85, 80 L.Ed. 62 (1935).
>
> "A law is the best expositor of itself". *Pennington v. Coxe*, 6 U.S. 33, 2 Cranch 33, 2 L.Ed. 199 (1804).

In *Wilbur v. U.S. ex rel. Vindicator Consolidated Gold Mining Co.*, 52 S.Ct. 113, 284 U.S. 231, 76 L.Ed. 261 (1931), this Court held that the "(H)istory of legislation may not be invoked in construing a statute, the language and meaning of which are clear." Similarly, the Court stated in *Gemsco, Inc. v. Walling*, 65 S.Ct. 605, 324 U.S. 244, 89 L.Ed. 921 (1945), that "(T)he plain words and meaning of a statute cannot be overcome by legislative history". Yet the court below did just that. It resorted to prior statutes and committee reports to create doubt in the explicit, clear and plain definition of "year" found in §687(a)(2) of the statute.

Finally, it is perhaps ironic that the Government insists that §687 was intended to be a mere revision and that Congress erred in revising the former statute. For, if this be true, the courts are not free to look to the original statute to determine whether an error has been made in revision *absent doubtful language* in the revised statute. *Victor v. Arthur*, 104 U.S. 498, 26 L.Ed. 633 (1881). As we have seen, in the instant case the language of §687(a) does not become doubtful until *after* one resorts to legislative history. Unfortunately, this fact was overlooked by the court of appeals.

B. The Legislative History of the Statute Is Ambiguous.

As previously noted, Petitioners are in complete agreement with the *Schmid* Court, the *Cass* Trial Court and the holding of the Trial Court herein, that the language of the statute is clear and the meaning unambiguous. Petitioners agree that there is no room for statutory construction.

However, the court of appeals, after finding ambiguity, reversed on the basis of a legislative intent which it purported to find by means of a tool of statutory

construction—namely, the legislative history of the statute. Assuming arguendo an ambiguity exists in the language of the statute, in this instance legislative history is of no help whatsoever in attempting to ascertain legislative intent. The history of this statute simply does not support the Respondent's assertions that the rounding provision applies *clearly* only to the quantum of readjustment pay and not to eligibility therefor.

1. *The Statute Is Not Clearly a Result of a Mere Codification of Earlier Law and Nothing More.*

Respondent's contention that in its present form, 10 U.S.C. §687(a) is a mere codification of earlier law and should be so interpreted "begs the question". This statute, passed as Public Law 87-651 on September 7, 1962, was the result of H.R. 10433. H.R. 10433 was made up of three separate bills. They were incorporated as Titles I, II and III to the bill. The proposals as to §687 appeared in Title I. The bill was described as a bill "to amend Title 10, United States Code, to codify recent military laws and to improve the code, . . ."[3]

Thus, it is certainly arguable that Title I of the bill was concerned with the first stated purpose—to amend Title 10; that Title II of the bill was the part which codified recent military laws and Title III of the bill contained general improvements in the Code. An examination of the revision notes to the bill reveals that this matching by Titles and purposes works. This interpretation is buttressed by Mr. Libonati's reference to H.R. 10433 as three bills.[4]

In addition, the appendix to the revision notes containing the text of §687 as revised refers to said text

[3]U.S. Code Cong. & Adm. News p. 2456 and Congressional Record - House; 1962, p. 4435.

[4]Congressional Record-House, 1962, p. 4441.

as *new matter* and, according to custom, presents it in italics presumably to distinguish it from old matter.[5] Such treatment is not indicative of a mere change in the form of old matter.

There is further proof that at least some of the draftees intended substantial changes in the law concerning readjustment pay in 1962 and, at the same time, there is evidence that the legislators were confused about the law. Such confusion was not eliminated with the passage of P.L. 87-651.

In the *Revision Notes* to H.R. Report 1401 (87th Cong., 2d Session, 1962), the Judiciary Committee stated that the words "lump sum" and "(F)or the purposes of" are omitted from (new bill) as *surplusage*.[6] The words "lump sum" which appeared in the body of the existing statute, 50 U.S.C. 1016, were, in fact, deleted from the new act. However, we know that the wording "(F)or the purposes of" was not abandoned. The wording found in the body of 50 U.S.C. 1016, "(F)or the purposes of computing the amount of readjustment payment", was simply relocated at the end of §687(a) and modified to "For the purposes of this subsection—". Several questions remain unanswered. Exactly what words were considered surplusage by the House Committee and were to be omitted? Why was the Senate silent on the subject? Why did the words reappear in the act if they were to be omitted? Why were the exact words "(F)or the purposes of this subsection—" chosen? Petitioners respectfully submit that we cannot know the answers from this vantage point. The legislative history is ambiguous. It can be used to support several hypotheses. It certainly does not support the Respondent's theory that the key words found in 50 U.S.C. 1016 were omitted unintentionally, to the exclusion of all other possibilities.

[5] H.R. Rpt. 1401, 87th Congress, 2nd Session, p. A-20.

[6] H.R. Rpt. 1401, 87th Congress, 2nd Session, p. A-1.

To illustrate this point, petitioners offer the following as a logical hypothesis for the present form of the statute. H.R. 10433 incorporated the definition of "continuous active duty" from the body of 50 U.S.C. 1016 and placed it in sub-section (1) of §687(a), but the new bill did not omit any of the former words as surplusage.

The new bill also adopted the definition of the word "year" found in the body of 50 U.S.C. 1016 and placed it in sub-section (2) of §687(a). But Congress specifically omitted the qualifying, limiting phrase which preceded that definition in the earlier statute–(i.e., "(F)or the purposes of computing the amount of readjustment payment.") The only clue we are given is that the House Judiciary Committee states that it did so because the phrase was surplusage.

Why was it surplusage? In reading 50 U.S.C. 1016(a), it is apparent that the drafters of the new bill understood the word "amount" in the subject phrase to include any sum between $0.00 and $15,000.00–that is, eligibility for any amount as well as computation of a specific amount of readjustment pay. How and why did they reach this conclusion? 50 U.S.C. 1016(a) also read in pertinent part:

> "For the purposes of computing the amount of readjustment payment; . . .; any prior period for which readjustment pay has been received under any other provision of law shall be excluded."

Did the drafters of 50 U.S.C. 1016(a) intend only that prior years of service for which severance or readjustment pay had been received under prior or parallel statutes could not now be counted by a serviceman in computing the quantum of readjustment pay due him under 50 U.S.C. 1016(a) should he re-enlist and begin a new period of active duty or did they mean to ensure that a former serviceman who had received payment under a different statute could not now reapply for a second payment on

the basis of his original active service under the newly passed statute. The answer must be the latter was intended, otherwise, a pandora's box of valid claims would be opened—not to be closed until a much later date by the effect of the applicable statute of limitations.

In other words, the "prior period" exclusion found in 50 U.S.C. §1016(a) referred to eligibility for, as well as computation of, the amount of readjustment pay and this was understood by the framers of the new bill H.R. 10433. They saw that both the "six month or more" definition of a year and the "prior period" exclusion applied to entitlement as well as computation of amount and they acted accordingly. They adopted both provisions and set them out in the new legislation as (2) and (3) of §687(a) *after* dropping the surplus introductory phrase and replacing it with an unambiguous one.

Can it be argued in good conscience that §687(a)(3) which reads "For the purposes of this subsection— . . . (3) a period for which the member concerned has received readjustment pay under another provision of law may not be included." applies only to computation of the amount of pay and not to eligibility for readjustment pay as well? Can it be said that the 87th Congress intended that a serviceman who received readjustment pay under 50 U.S.C. 1016 could now claim eligibility for a second readjustment payment under Title 10 on the basis of the same active service? Hardly, but that tortured result is a logical extension of the Government's interpretation of the definition of the word "year" which had the very same introductory phrase in 50 U.S.C. 1016(a) and has the same one in §687(a). The legislative treatment and history of §687(a)(2) and §687(a)(3) have been identical. How can their interpretation differ?

2. *There Is Prior Statutory Precedent To Support the "Plain Meaning" Interpretation of §687 Offered by Petitioners.*

The Government has noted that several other statutes containing "rounding provisions" differ markedly in form from 10 U.S.C. §687, and, by analogy, argue that the rather circuitous method used by Congress herein indicates clearly a revision error and nothing more. The Government does recognize one major exception, 10 U.S.C. §6330, which deals with the retainer pay of enlisted members upon their transfer to the Fleet Reserve or Fleet Marine Corps Reserve. Petitioners submit that it is a most important exception for it is undeniable precedent that a *determination of eligibility* can be set out in a subsequent subsection, containing a definition of the word "year", which is used earlier in the body of the statute. Subsection (b) of 10 U.S.C. §6330 sets up a minimum of 20 *years* of active service for *eligibility* for retainer pay. Subsection (c) deals with the *computation* of retainer pay. Then, in subsection (d), language which is almost identical to that found in §687(a)(2) is used.

> "(d) For the purposes of subsections (b) and (c), a part of a year that is less than six months or more is less than six months is disregarded. . . ." (10 U.S.C. §6330(d))

10 U.S.C. §6330 was adopted in its above form as part of Public Law 85-583 on August 1, 1958, barely four years prior to the enactment of 10 U.S.C. §687. It is not reasonable to assume that in copying the very form of §6330, the drafters of §687(a)(1), (2) and (3) were consciously adopting a form and style which they found were recently utilized in Title 10, U.S.C. Is it not reasonable to conclude that they purposely used a subsection to define the period of eligibility (years), just as the 85th Congress had done in a similar military pay statute?

3. *Where Legislative History Is Ambiguous, the Courts Will Look to the Statute for Legislature Intent.*

Petitioners submit that in view of the foregoing, legislative history is most inconclusive and permits a variety of reasonable hypotheses concerning the present form of §687(a). This being the case, the court below erred in not returning to the statute itself in the judicial search for legislative intent. See *Citizens To Preserve Overton Park, Inc.*, 91 S.Ct. 814, 401 U.S. 402, 28 L.Ed. 136, on remand 335 F. Supp. 873 (1971). In failing to do so, the court of appeals allowed contradictory, ambiguous legislative materials to control the customary meaning of words. See *N.L.R.B. v. Plasterer's Local Union No. 79*, 92 S.Ct. 360, 404 U.S. 116, 30 L.Ed.2d 312 (1971).

Had the court returned to the statute itself, it could have resolved the apparent, internal inconsistency which it had found earlier, by resorting to a simple, well-defined tool of statutory construction. Specific provisions of a statute govern and supercede general provisions included in the same statute. *Adams v. Woods*, 6 U.S. 336, 2 Cranch 336, 2 L.Ed. 297 (1805); *Baltimore Nat. Bank v. State Tax Commission of Maryland*, 56 S.Ct. 417, 297 U.S. 209, 80 L.Ed. 586 (1936). The rule remains viable even though the general provisions, if standing, alone, would include the same subject. *Karrell v. U.S.*, 181 F.2d 981, 9th Circuit, 1950, cert. den. 340 U.S. 891, 71 S.Ct. 206, 95 L.Ed. 646 (1950); *Monte Vista Lodge v. Guardian Life Insurance Co. of America*, 384 F.2d 126 (9th Circuit 1967), cert. den. 88 S.Ct. 1041, 390 U.S. 950, 19 L.Ed. 1142.

Accordingly, the body of §687(a) deals with both entitlement to and computation of readjustment pay. It uses the word year in relation to both subjects without

defining that term. Next, there appears the introductory and limiting phrase "(F)or the purposes of this subsection—", which is followed by subsection (2) containing a specific definition of the word "year". Petitioners concede that if (2) were not part of the statute and the general provision stood alone, for the purposes of subsection §687(a), a year would have to be defined as a twelve month, calendar year—for both entitlement and computation. It does not stand alone, however. The introductory phrase found in subsection 687(a) appearing just before the text of subsections (1), (2) and (3), indicates to the reader that what is to follow will explain subsection 687(a) in certain specific areas. Then, the application of the familiar rule of construction that a specific provision governs a general provision, dissolves any apparent inconsistency. For the purposes of subsection 687(a), which undeniably deals with entitlement to as well as computation of readjustment pay, a year is defined as "a part of a year that is six months or more. . . ."

4. *In Light of the Legislative History of the Statute, Administrative Interpretation Is Entitled to No Weight.*

The Respondent offers the fact that all branches of the armed services have interpreted §687(a) as requiring a full five years of service for entitlement purposes and argues that such interpretation be afforded great weight by the courts. Petitioners agree that long and continuous uniform administration is normally deserving of some consideration. In the instant case, however, neither factor is present.

First, consistency or uniformity is illusory. With the exception of the Coast Guard, all of the armed services are under the aegis of the Department of Defense. In actuality, the Department of Defense Pay and Allowances

Entitlement Manual §40411 and 40414 construed the statute and all of the services adopted the same construction in their regulations. One must wonder aloud if they were free to act differently.[7]

Secondly, less than nine years elapsed from the passage of the statute in question until the *Schmid* decision by the Court of Claims in January of 1971. An administrative interpretation by essentially one governmental agency which was deemed faulty by the first court called upon to decide the issue is not deserving of "time-honored" stature.

CONCLUSION

Petitioners respectfully submit that the statutory language is clear, that no ambiguity exists in the language, form or style of the statute, and that they are entitled to readjustment pay on the basis of four years and six

---

[7]In fact, two of the regulations, Sec. Nav. Instr. 1900.7B and Mar. Cor. Ord. 1900.1H(7), refer to the DOD Pay and Entitlements Manual by name.

months of continuous active service. Petitioners also submit, that if legislative history is searched for a legislative intent, a case can be made for several intentions and that the legislative history falls far short of providing as Respondent argues, a clear view of the intent of Congress so as to negate the plain meaning of the words:

> "(F)or the purposes of this subsection–
> "(1) . . .
> "(2) A part of a year that is six months or more is counted as a whole year, ..." (10 U.S.C. §687(a).

Respectfully submitted,

WILLIAM A. DOUGHERTY
PAUL R. CONSTANTINO
17291 Irvine Boulevard
Tustin, California 92680
Telephone: (714) 838-7222
Counsel for Petitioners

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-5661

FRANCIS A. ADAMS, ROBERT J. STENEMAN; and MICHAEL W. YOUNGQUIST,

Petitioners,

v.

THE SECRETARY OF THE NAVY and COMMANDANT OF THE MARINE CORPS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

WILLIAM A. DOUGHERTY
DOUGHERTY and CONSTANTINO
17291 Irvine Blvd., Ste. 405
Tustin, California 92680
(714) 838-7222

Counsel for Petitioners

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-5661

FRANCIS A. ADAMS, ROBERT J. STENEMAN;
and MICHAEL W. YOUNGQUIST,

Petitioners,

v.

THE SECRETARY OF THE NAVY and
COMMANDANT OF THE MARINE CORPS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

ARGUMENT

I.

THE GOVERNMENT HAS FAILED TO SHOW THAT SIX MONTHS OR MORE DOES NOT EQUAL A FULL YEAR FOR ELIGIBILITY AND COMPUTATION

The statute, 10 U.S.C. 687(a), (1962), is clear on its face. There is no need to resort to legislative history.

The plain meaning of the words of the statute is expressed in three clauses:

The standard is set:

"... At least five *years* of *continuous active duty* ..." (emphasis ours).

The elements of the standard are then specifically defined:

"For the purpose*s* of this subsection – (emphasis ours)

(1) a period of active duty is continuous ... (not in issue)

(2) a part of a *year* that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded; ..." (emphasis added)

The prefatory phrase "... For the purposes of this subsection ..." refers to the entire subsection. It is in no way limited to computation alone.

The clauses (1) and (2) specifically define or modify:

"continuous active duty"

and

"years"

Were the man on the street shown the statute stripped to its elements and asked what it meant, he would say, "It means that six months or more counts as a whole year."

II.

THE GOVERNMENT DOES NOT DENY THAT SINCE 1958, THE NAVY DEPARTMENT HAS ROUTINELY BEEN ALLOWING ENLISTED NAVY-MARINE, REGULAR-RESERVE, 20-YEAR ACTIVE DUTY MEMBERS TO RETIRE WITH 19 YEARS SIX MONTHS ACTIVE DUTY UNDER 10 U.S.C. §6330

The clauses that set the standard of the two statutes are:

"... at least five years on continuous active duty, ..." 10 U.S.C. §687(a).

"... 20 or more years of active service ..." 10 U.S.C. §6330.

The defining clauses are:

"For the purposes of this subsection –

(2) A part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded; ..." 10 U.S.C. §687(a).

(d) For the purposes of subsections

(b) [completed 20 or more years of active service] and

(c) [formula for pay]

a part of a year that is six months or more is counted as a whole year and a part of a year that is less than six months is disregarded ..." 10 U.S.C. §6330.

The words of the statutes are exactly the same.

The Government construes them differently, favoring the Regulars over the Reserves.[1]

[1] The Government admits on page 12 of its Brief that the Rounding Section of 10 U.S.C. §6330 applies to both eligibility and computation. While both Regulars and Reserves are protected by 10 U.S.C. §6330, it is submitted the number of Reserves serving 19½ years on active duty is nominal.

III.

THE DIFFERENT CONSTRUCTIONS OF THE TWO STATUTES, BOTH APPLYING TO RESERVISTS, IS DISCRIMINATORY AND REPUGNANT TO 10 U.S.C. §277.

"Laws applying to both Regulars and Reserves shall be administered without discrimination –

(1) among Regulars;

(2) among Reserves; and

(3) between Regulars and Reserves."

10 U.S.C. §277.

The department of defense is violating the spirit of the reserve readjustment pay statute, 10 U.S.C. §687(a) when it encourages certain Reservists to extend their tour of duty over four years, not with the hope of retiring "on 20", but instead promising readjustment pay should they be involuntarily separated and then reneging on its promise. It is little wonder the armed forces are having serious problems in retaining bright, capable and motivated young officers such as these.[2]

The Government has broken its word.

Respectfully submitted,

/s/ WILLIAM A. DOUGHERTY
DOUGHERTY and CONSTANTINO
17291 Irvine Blvd., Ste. 405
Tustin, California 92680
(714) 838-7222

Counsel for Petitioners

[2]Captains Adams, Steneman and Youngquist are all highly qualified, honorably separated service men, – Marine Aviators.

CASS *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 73–604. Argued April 16, 1974—Decided May 28, 1974*

Title 10 U. S. C. § 687 (a) provides for readjustment pay for an Armed Forces Reservist who is involuntarily released from active duty and has completed, immediately before his release, "at least five years of continuous active duty," computed by multiplying his years of active service by two months' basic pay of his grade at the time of release, and further provides that "[f]or the purposes of this subsection— . . . (2) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded . . . ." *Held:* The "rounding" provision, as is clear from the statute's legislative history, applies only in computing the amount of readjustment pay, and not in determining eligibility therefor; hence, a Reservist must serve a minimum of five full years of continuous active duty before his involuntary release in order to qualify for readjustment benefits. Pp. 75–84.

483 F. 2d 220, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting statement, *post*, p. 84.

Arthur B. Hanson argued the cause for petitioner in No. 73–604. With him on the briefs was *Charles A. Smith*. *William A. Dougherty*, by appointment of the Court, 416 U. S. 934, argued the cause and filed briefs for petitioners in No. 73–5661.

William L. Patton argued the cause for respondents in both cases. With him on the brief were *Solicitor General*

*Together with No. 73–5661, *Adams et al.* v. *Secretary of the Navy et al.*, also on certiorari to the same court.

Bork, Acting Assistant Attorney General Jaffe, Robert E. Kopp, and *Anthony J. Steinmeyer.*†

MR. JUSTICE WHITE delivered the opinion of the Court.

Congress has provided in 10 U. S. C. § 687 (a) [1] that an otherwise eligible member of a reserve component of the Armed Forces, who is involuntarily released from active duty, "and who has completed, immediately before his release, at least five years of continuous active duty, is entitled to a readjustment payment computed by multiplying his years of active service . . . by two months' basic pay of the grade in which he is serving at the time of his release." It is further provided that "[f]or the purposes of this subsection— . . . (2) a part of a year that is six

†*Kevin M. Forde* filed a brief for John N. O'Meara as *amicus curiae* urging reversal in both cases.

[1] In full, 10 U. S. C. § 687 (a) provides:

"§ 687. Non-Regulars: readjustment payment upon involuntary release from active duty.

"(a) Except for members covered by subsection (b), a member of a reserve component or a member of the Army or the Air Force without component who is released from active duty involuntarily, or because he was not accepted for an additional tour of active duty for which he volunteered after he had completed a tour of active duty, and who has completed, immediately before his release, at least five years of continuous active duty, is entitled to a readjustment payment computed by multiplying his years of active service (other than in time of war or of national emergency declared by Congress after June 28, 1962), but not more than eighteen, by two months' basic pay of the grade in which he is serving at the time of his release. However, a member who is released from active duty because his performance of duty has fallen below standards prescribed by the Secretary concerned, or because his retention on active duty is not clearly consistent with the interests of national security, is entitled to a readjustment payment computed on the basis of one-half of one month's basic pay of the grade in which the member is serving at the time of his release from active duty. A person covered by this subsection may not be paid more than

months or more is counted as a whole year, and a part of a year that is less than six months is disregarded . . . ." We must decide whether the "rounding" provision set forth in § 687 (a)(2) is to be applied in determining eligibility for readjustment pay, as well as in computing the amount of readjustment pay to which an eligible reservist is entitled, so that involuntarily released reservists who have completed four years and six months or more, but less than five years, of continuous active duty prior to their release are nonetheless entitled to a readjustment payment. The Court of Appeals held that the rounding clause applied only to computation of readjustment payments, 483 F. 2d 220 (1973), contrary to the earlier decision of the Court of Claims that the rounding provision is applicable in determining eligibility for, as well as computation of, readjustment payments under § 687. *Schmid* v. *United States*, 193 Ct. Cl. 780, 436 F. 2d 987, cert. denied, 404 U. S. 951 (1971). We granted certiorari to resolve the conflict, 414 U. S. 1128 (1974), and now affirm the judgment of the Court of Appeals.

Each petitioner had served continuously for more than four years and six months, but less than five years, when notified that he would be honorably but involuntarily released from active duty in the reserves. In No. 73–604, petitioner Cass, a captain in the Army Reserve, was in fact released from active duty before completing five

---

two years' basic pay of the grade in which he is serving at the time of his release or $15,000, whichever amount is the lesser. For the purposes of this subsection—

"(1) a period of active duty is continuous if it is not interrupted by a break in service of more than 30 days;

"(2) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded; and

"(3) a period for which the member concerned has received readjustment pay under another provision of law may not be included."

years of service, and when the Army denied his request for readjustment pay, he brought suit in the United States District Court for the District of Montana, which granted relief on the authority of the Court of Claims' decision in *Schmid, supra*. In No. 73–5661, petitioners Adams, Steneman, and Youngquist, captains in the Marine Corps Reserve, brought separate actions in the Central District of California, prior to their release, seeking a modification of their release orders to provide for readjustment pay. The District Court subsequently held that they were entitled to readjustment pay based on active service of more than four and one-half years.[2] The Government's appeals from the decisions of the two District Courts were consolidated, and the Court of Appeals reversed each, holding that the statute and its legislative history make clear that readjustment pay is not to be provided to reservists involuntarily released from active duty with less than five full years of continuous service.[3]

Petitioners assert to the contrary that the language of § 687 (a) unambiguously establishes that four and

[2] The District Court had earlier granted petitioners' motion for a preliminary injunction prohibiting their involuntary release without readjustment pay. As a result, these petitioners had each served more than five years on active duty by the time the decision awarding them readjustment benefits was rendered. In deciding they were entitled to readjustment pay, however, the District Court expressly disclaimed any reliance on the fact that they actually served more than five years, since they were permitted to do so only under the compulsion of the court's preliminary injunction. The injunction was dissolved as moot in the wake of the award of readjustment pay.

[3] The Court of Appeals also held that the injunction granted in favor of petitioners in No. 73–5661, see n. 2, *supra*, was improperly issued and could not be relied upon to support eligibility for readjustment benefits. 483 F. 2d 220, 222 (1973). That ruling is not challenged in this Court.

one-half years of continuous active service qualifies an involuntarily released reservist for readjustment benefits, that the legislative history of the rounding provision should therefore not be considered in resolving the issue, and that even if the legislative history is considered, it supports the construction urged by petitioners as much as that contended for by the Government. We are unpersuaded by these arguments, however.

The statute sets out both the eligibility requirements for entitlement to readjustment pay and the method of computing the amount of the applicable payment in the same sentence. Entitlement is based, in part, on the completion, immediately before the involuntary release of a reservist, of "at least five years of continuous active duty," and the payment is to be computed by multiplying the reservist's "years of active service" by two months' basic pay of the grade in which he is serving when released. Because the rounding provision expressly provides that it is to be applied for "purposes of this subsection," petitioners contend that the provision modifies the term "year" whenever that term appears in the subsection, *i. e.*, to determine whether a reservist has completed five years of service to be eligible for readjustment benefits, as well as to determine the number of years of service to use as a multiplier in computing the amount of readjustment pay owed. This is so plainly true, petitioners contend, that resort to legislative history is unnecessary and improper.[4]

[4] Petitioners rely on cases suggesting that recourse to legislative materials is unwarranted when the meaning of statutory language is clear and unequivocal. *E. g.*, *United States* v. *Oregon*, 366 U. S. 643, 648 (1961); *Ex parte Collett*, 337 U. S. 55, 61 (1949); *Helvering* v. *City Bank Co.*, 296 U. S. 85, 89 (1935); *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 83 (1932). In the first two of these cases, though finding the language to be construed this

Our view is to the contrary. The rounding provision is arguably subject to the interpretation given it by petitioners, but did Congress intend that provision to override its explicit requirement of "at least" five years of service? We think the answer to that question is sufficiently doubtful to warrant our resort to extrinsic aids to determine the intent of Congress, which, of course, is the controlling consideration in resolving the issue before us.[5] Moreover,

---

clear, the Court nonetheless did look at the legislative history of the statutory provisions to be interpreted.

[5] A majority of the Court of Claims in *Schmid* v. *United States*, 193 Ct. Cl. 780, 436 F. 2d 987 (1971), though they also examined the legislative history, found it clear from the language of § 687 (a) that the rounding provision should apply to both eligibility and computation determinations, whereas the Court of Appeals in these cases thought it clear that the minimum five-year eligibility clause is "not subject to the interpretation given it by the court in *Schmid*." 483 F. 2d, at 222. Obviously there is room for reasonable dispute over the construction of § 687 (a) based on the statutory language alone.

Petitioners tender other arguments, apart from that founded on the consistent use of the word "years," to demonstrate that, read in its statutory context, the rounding provision in § 687 (a) was plainly intended to establish the minimum qualifying term of service at four years, six months, but none of them overcomes the ambiguity created by the direct establishment of "at least five years" of service as a qualification for readjustment benefits. Thus, it is argued that § 687 (a) (3) excludes from the determination of both eligibility and the amount of benefits payable "a period for which the member concerned has received readjustment pay under another provision of law," and given the grammatical structure of § 687 (a), n. 1, *supra*, that the rounding rule in subsection (2) must be applied for the same purposes as the "prior period exclusion" rule of subsection (3). The Government asserts that the underlying premise that subsection (3) applies for both purposes is erroneous. As was the case with the rounding provision before codification, see text *infra*, the prior period exclusion was expressly to be applied only "[f]or the purposes of computing the amount of the readjustment payment." Act of June 28, 1962, 76 Stat. 120. Furthermore, the current Department of Defense Military Pay and Allowances Entitlements Manual § 40414 (b) (Jan. 1, 1967) still excludes such prior service only for

the Court has previously stated that "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which

---

computing the amount of readjustment pay due, not for determining entitlement. The Government suggests, therefore, that if §§ 687 (a)(2) and (3) are to be construed as applicable for the same purpose, that purpose is only for computation. Manifestly, the parties' dispute over the applicability of subsection (3) does not resolve the issue of when subsection (2) is to apply; it merely restates the problem.

Petitioners also rely on 10 U. S. C. § 6330, which expressly applies a like rounding rule both to determine eligibility for transfer to the Fleet Reserve and, thereby, for retainer pay, by enlisted members of the Navy and Marine Corps, and to compute the amount of retainer pay due. The pertinent portions of § 6330 provide as follows:

"§ 6330. Enlisted members: transfer to Fleet Reserve and Fleet Marine Corps Reserve; retainer pay.

. . . . .

"(b) An enlisted member of the Regular Navy or the Naval Reserve who has completed 20 or more years of active service in the armed forces may, at his request, be transferred to the Fleet Reserve. An enlisted member of the Regular Marine Corps or the Marine Corps Reserve who has completed 20 or more years of active service in the armed forces may, at his request, be transferred to the Fleet Marine Corps Reserve.

"(c) Each member who is transferred to the Fleet Reserve or the Fleet Marine Corps Reserve under this section is entitled when not on active duty, to retainer pay at the rate of 2½ percent of the basic pay that he received at the time of transfer multiplied by the number of years of active service in the armed forces . . . .

"(d) For the purposes of subsections (b) and (c), a part of a year that is six months or more is counted as a whole year and a part of a year that is less than six months is disregarded. A completed minority enlistment is counted as four years of active service, and an enlistment terminated within three months before the end of the term of enlistment is counted as active service for the full term."

It is readily apparent that the rounding provision of § 687 (a)(2) contains an ambiguity not present in the more explicit language of

forbids its use, however clear the words may appear on 'superficial examination,'" *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, 543–544 (1940). *Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479 (1943). Such aid is available in this case and we decline to ignore the clearly relevant history of § 687 (a).

Certain reservists involuntarily released from active duty are granted lump-sum readjustment pay to help them readjust to civilian life and to encourage qualified reservists to remain on active duty for extended periods. Readjustment pay was first provided by the Act of July 9, 1956, 70 Stat. 517, which conditioned entitlement on the completion immediately prior to release of "at least five years of continuous active duty." It also provided that "[f]or the purposes of computing the amount of readjustment payment (1) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded . . . ." *Ibid.* As first introduced and passed by the House, however, the bill provided, as the codified version does now, that "[f]or the purposes of this subsection" the six-month rounding provision would apply. H. R. Rep. No. 1960, 84th Cong., 2d Sess., 9 (1956); 102 Cong. Rec. 10120 (June 12, 1956). It was nonetheless made clear by the debate in the House prior to passage that five years was to be the minimum eligibility requirement.[6]

---

§ 6330 (d). Nor does the particular rounding provision in § 6330 indicate any legislative custom in this context that should control the construction of § 687 (a). At most, § 6330 indicates that the construction of § 687 (a) proffered by petitioners *could* fit within the structure of Title 10, not that the section *must* be so construed.

[6] The sponsor of the legislation, Representative Brooks, engaged in the following dialogue and explanation:

"Mr. BROOKS of Louisiana. . . . We started with 5 years because we estimate that the average individual who stays 5 years in the service has in view making a career of that service. After he has

The Senate, focusing on a letter from the Comptroller General to the Chairman of the Armed Services Committee suggesting that the language be clarified to ensure that five years was to be the minimum period necessary to qualify for a readjustment payment, amended the bill to reflect this more clearly,[7] *id.*, at 11333–11334

---

gone a long way toward making a career of the service and when we take that opportunity away from him and turn him back to civilian life, we feel that there should be some sort of readjustment.

. . . . .

"Mr. GROSS. The minimum, then, is 5 years; is that correct?

"Mr. BROOKS of Louisiana. That is correct. The reason for the 5 years, of course, is that a 3-year enlistment would require a reenlistment, or . . . a man who is in for 4 years will have to reenlist for an extended period. After he completes the first enlistment I think he intends to stay in the service and this encourages him to stay in the service as long as the service needs him." 102 Cong. Rec. 10118–10119 (1956).

[7] The Comptroller General's letter was contained in the Senate Report and provides in pertinent part as follows:

"Although the language of subsection (a) of the bill seems to indicate that a minimum of 5 years' continuous active duty as an officer or warrant officer is necessary to qualify for a readjustment payment, the last sentence of that subsection appears to reduce the minimum qualifying service to 4 years and 6 months. Presumably the provision authorizing the counting of 6 months or more as a whole year was intended to apply only for the purpose of computing the amount of a lump-sum payment and not the quantum of qualifying service. If so, the language should be clarified, perhaps somewhat as follows:

"'For the purpose of computing the amount of the readjustment payment a fractional part of a year amounting to 6 months [or 183 days] or more shall be counted as a whole year and a shorter period shall be disregarded.'" S. Rep. No. 2288, 84th Cong., 2d Sess., 11 (1956).

The report itself explains that the amended provision in the bill was designed to limit the application of the rounding formula "to years used in the computation of readjustment pay and not for years to establish the 5-year minimum of substantially continuous active duty that is required to qualify for readjustment payments." *Id.*, at 2.

(June 29, 1956), and the House readily concurred the same day in the Senate amendments to the bill as the final language of the 1956 Act, *id.*, at 11503–11504.

The Act was amended in June 1962, primarily to raise the amount of readjustment benefits paid to involuntarily released reservists to equal the amount provided as severance pay to involuntarily released regular officers,[8] but it retained the explicit language specifying the use of the rounding provision for "purposes of computing the amount of the readjustment payment," 76 Stat. 120, and there was no discussion in the congressional reports[9] suggesting any modification of this language. Less than three months later, however, the present language was adopted as part of a measure codifying "recent military laws." Act of September 7, 1962, 76 Stat. 506. The committee reports accompanying the codification proposal make plain that no change in the eligibility requirements for readjustment pay was intended by the enacted change in phraseology.[10] The Senate Judiciary Committee Report explained the purpose of the proposal as follows:

> "This bill, as amended, is not intended to make any substantive change in existing law. Its purpose is to bring up to date title 10 of the United States Code, by incorporating the provisions of a number of public laws that were passed while the bill to enact title 10 into law was still pending in the Congress, and to transfer to title 10, provisions now in

[8] See H. R. Rep. No. 1007, 87th Cong., 1st Sess. (1961); S. Rep. No. 1096, 87th Cong., 1st Sess. (1961).

[9] N. 8, *supra*.

[10] The codification bill had been referred in both the House and the Senate to the Judiciary Committees, unlike the earlier substantive consideration of the bills establishing and amending the readjustment pay provisions by the Armed Services Committees of the respective chambers of Congress.

other parts of the code." S. Rep. No. 1876, 87th Cong., 2d Sess., 6 (1962).

The same limited purpose was expressed by the House Judiciary Committee, which further explained that "[s]ome changes in style and form have been made to conform the provisions to the style and form of title 10, but these changes do not affect the substance." H. R. Rep. No. 1401, 87th Cong., 2d Sess., 1 (1962).

These congressional comments, combined with the fact that no consideration of any change in eligibility standards appears in either the cited committee reports or in the proceedings leading to adoption of the codification bill by the House, 108 Cong. Rec. 4435–4441 (1962), and by the Senate, 108 Cong. Rec. 17088–17089 (1962), conclusively demonstrate that Congress did not reduce the minimum period of qualifying service for entitlement to readjustment benefits from five to four and one-half years when it substituted the words in the codified version of § 687 (a) for the unambiguous language of the prior substantive enactments. We are unpersuaded by petitioners' claim that the codified version is nevertheless to be accepted as correctly expressing the will of Congress and as a mere unexplained version of the language of prior law, see *Continental Casualty Co.* v. *United States*, 314 U. S. 527, 529–530 (1942); *United States* v. *Bowen*, 100 U. S. 508, 513 (1880). Here the meaning of the predecessor statute is clear and quite different from the meaning petitioners would ascribe to the codified law; and the revisers expressly stated that changes in language resulting from the codification were to have no substantive effect. *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U. S. 222, 227–228 (1957); *United States* v. *Cook*, 384 U. S. 257, 260 (1966); *City of Greenwood* v. *Peacock*, 384 U. S. 808, 815–816 (1966).

The Court of Claims in the *Schmid* case, 193 Ct. Cl. 780, 436 F. 2d 987 (1971), thought that in codifying § 687 (a), Congress restored the original language of the 1956 House bill, which it knew had been interpreted by the Comptroller General as reducing the minimum eligibility requirement to four years, six months. *Id.*, at 787, 436 F. 2d, at 991. But the codification language was accompanied by no reference to the 1956 legislation or to the views then expressed by the Comptroller General.[11] What is more, it is plain that the language of the original 1956 bill was itself not intended to set the minimum eligibility period at less than five years.[12] The codification, if construed as petitioners would have it, would not represent a "return" to the original intent of Congress. It is also significant that there is no hint of any consideration of what such a change would cost or how it would affect the goals of the readjustment pay provisions, contrary to the careful attention these matters received when benefits under the readjustment pay statute were raised in 1962. As Judge Nichols commented in dissenting from the decision in *Schmid:* "In resolving ambiguity, we must allow ourselves some recognition of the existence of sheer inadvertence in the legislative process." *Id.*, at 789, 436 F. 2d, at 992. Finally, we cannot agree with the contention that a change in minimum eligibility from five to four and one-half years should not be considered a "substantive change" because once a reservist must re-enlist beyond the initial enlistment term of four years, the purpose of the readjustment benefit scheme as an inducement to extended service is satisfied. Not only is the selection of the particular minimum term of eligibility a peculiarly legislative task dependent upon substantive judgment, but the very fact that such a

[11] See n. 7, *supra*.

[12] See n. 6, *supra*.

change involves a substantially greater expenditure of funds places this sort of revision into the substantive realm.

We thus conclude that the rounding provision of § 687 (a)(2) is applicable only in the determination of how much readjustment pay an otherwise qualified reservist is authorized, and that such a reservist must serve a minimum of five full years of continuous active duty before he is involuntarily released in order to be eligible for readjustment benefits. The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE DOUGLAS, agreeing with the Court of Claims in *Schmid* v. *United States*, 193 Ct. Cl. 780, 436 F. 2d 987, would reverse the judgment of the Court of Appeals.